THE CONTENT AND CONTEXT OF HATE SPEECH

Rethinking Regulation and Responses

Edited by Michael Herz and Peter Molnar

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Interview with Robert Post

Peter Molnar: When I first came to the United States, a friend told me that the supposedly strong protection of freedom of speech in this country is simply a myth. Would you agree?

Robert Post: I suppose it would depend upon what one means by "myth." In certain communicative contexts – like the Internet, newspapers, magazines, or movies – constitutional protections for speech are quite robust. But in many other settings there is far less, if any, constitutional protection. So can we conclude that the reputation of a strong First Amendment is merely a myth?

PM: More narrowly, then: It is often stated that in the United States "hate speech"[1] is constitutionally immune from regulation. Is this correct?

RP: In many settings speech that is demeaning or degrading to particular minorities or genders or sexual orientations is regulated in the U.S. with few, if any, constitutional impediments. In private settings, for example, where there is no state action, constitutional restrictions do not apply. In such private settings hate speech can be regulated without constitutional constraint. There are also many public settings in which hate speech can be and is suppressed regularly and effectively. These tend to be settings in which the regulation of hate speech does not compromise public discourse.

PM: For example?

RP: In courtrooms, for example. Attorneys and judges will be penalized for hateful expression. So will teachers and students in public elementary and high schools,

[1] Peter Molnar explains why he places "hate speech" in quotation marks in "Responding to 'Hate Speech' with Art, Education, and the Imminent Danger Test," Chapter 10 herein, at n. 2.

This interview was conducted in New York City on October 29, 2009. Dean Post subsequently revised and expanded his remarks. Eds.

and even, in some contexts, in public universities. Prisoners, guards, and administrators will be regulated for hate speech in prisons, as will government employees in bureaucracies. There are lots and lots of settings in which in the United States government regulates or prohibits hate speech and First Amendment issues are not thought to arise.

This is an area in which conceptual precision is essential. First Amendment protections attach to speech acts, not to speech per se. The identity of a speech act is in part determined by its context. The same vile words, epithets, and concepts can therefore in different contexts be constitutionally conceptualized as entirely different kinds of speech acts and in consequence receive entirely different degrees of constitutional protection.

Speech acts that comprise "public discourse" – speech acts that we recognize as appropriate ways to influence the formation of public opinion – receive what we ordinarily conceive as the full measure of First Amendment protection. Hate speech that is part of public discourse will receive the same protection that public discourse generally receives. Hate speech that is not part of public discourse will not receive this kind of protection. So, for example, hateful words addressed by one employee to another in the context of employment within the Social Security Administration will receive only the minimal forms of constitutional protection that we accord to speech expressed by employees in the context of government employment about matters of private concern.

Because First Amendment protections depend on how a speech act is classified, and because "hate speech" is not in the United States itself recognized as a distinct constitutional category of speech act, it is never clear what circumstances people have in mind when they speak of the regulation of hate speech in the United States. Typically the claim that hate speech is constitutionally immune from regulation imagines hateful communications within public discourse, like expression in newspapers. Such speech does indeed tend to be protected from regulation. But because speech uttered in the workplace is not typically classified as public discourse, hate speech expressed in such a context is routinely suppressed.

PM: So how do we distinguish between those parts of the public sphere that comprise public discourse as you define it and those that do not?

RP: The concept of the "public sphere" is a sociological one. It refers to a sociological formation created by the circulation of texts. It typically comes into being when persons seek access to common facts and common information, and typically for some common purpose. There is a large and complicated literature, and much disagreement, on what the public sphere entails.[2] When I use the term "public discourse," by contrast, I am using it stipulatively to refer to those forms of communication which in our society are viewed as necessary to the processes by which public opinion is formed. We believe that such processes must be left relatively unregulated and that persons participating in such processes must be regarded by the law as autonomous and self-determining.[3] We believe that the legitimacy of our democracy depends upon these principles. Public opinion is formed within the public sphere, but which forms of communication are included within public discourse and which are not is ultimately a normative constitutional question.[4]

The distinction between public discourse and the public sphere can be seen in courtroom speech. The speech of the attorneys in the courtroom in a political trial no doubt forms part of the *public sphere*. Yet attorney speech within a courtroom is routinely and extensively regulated. Attorneys are regarded as officers of the court, not as autonomous private citizens. Attorney speech is therefore pervasively controlled by rules of evidence, rules of procedure and decorum, and so on. No judge would allow attorney speech to degenerate into racist diatribes, because such diatribes would undermine the organizational objective of a court to achieve justice. Attorney speech in a political trial would be part of the "public sphere" but it would not for normative constitutional purposes be regarded as "public discourse."

A more complicated example is radio and television broadcasting. Such broadcasting is certainly constitutive of the public sphere, but in the United States countervailing considerations prevent broadcasting from being unequivocally categorized as public discourse. Broadcasting represents a hybrid case, which is in some ways free and unregulated, and in many ways highly regulated. The categorization of broadcasting is a question of deep confusion within American constitutional law.[5] We do not permit mere indecency to be suppressed in public discourse, but we do permit its censorship within broadcasting. The Internet, by contrast, cannot be regulated in this way.

PM: It seems that in the United States much of the regulation of "hate speech" in the public sphere (though not the public discourse) has been done not by the state but by other organizations. Examples would include university speech codes.[6]

RP: One needs to distinguish various dimensions of the public sphere. There are aspects of the public sphere, like the courtroom example, which involve what I

[2] *See, e.g.*, Jürgen Habermas, "The Public Sphere: An Encyclopedia Article," in *Media and Cultural Studies: Key Works* 102 (Meenakshi Gig Durham & Douglas M. Kellner eds., Wiley-Blackwell 2001); Nancy Fraser, "Rethinking the Public Sphere," 25/26 *Social Text* 56 (1990).

[3] Robert Post, "Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse," 64 *U. Colorado L. Rev.* 1109 (1993); Robert Post, "Democracy and Equality," 1 *Law, Culture and the Humanities* 142 (2005), *republished in* 603 *Annals Amer. Acad. Political Soc. Science* 24 (2006).

[4] I discuss some of the enormously complicated considerations that form part of this normative question in Robert Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine* v. *Falwell*," 103 *Harv. L. Rev.* 601 (1990).

[5] *See* Robert Post, "Subsidized Speech," 106 *Yale L.J.* 151 (1996).

[6] *See generally* Arthur Jacobson and Bernhard Schlink, "Hate Speech and Self-Restraint," Chapter 12 herein.

have elsewhere called managerial domains. A managerial domain is an institution created to accomplish a specific function, to achieve a particular goal. The goal of a courtroom is to produce justice. The function of a university is to dispense education and to produce knowledge. Once a bounded institution exists that is oriented toward a specific mission, the institution will regulate persons within its domain in ways necessary successfully to achieve its function. And this implies that the institution will also regulate the speech of persons within its domain as is necessary to be instrumentally effective.[7] The constitutional rationale of public discourse is precisely the opposite of that of a managerial domain. The objective of the latter is to achieve its purposes; the objective of public discourse is to determine what our purposes are. Within public discourse, goals must perennially be taken as provisional and revisable.

PM: Control of "hate speech" in these "managerial settings" does not exhaust the instances of actual regulation in the United States. For example, Jacobson and Schlink point to two others: regulation of employers, making them liable for harassing speech by their employees, and the self-regulation of the broadcast and cable industries.[8] How do these latter contexts fit within your conceptual schema?

RP: With regard to workplace regulation, writers such as Cynthia Estlund contend that workplace speech should be considered part of public discourse, that is to say it should be considered part of public-opinion formation.[9] The proposition is serious and debatable, but it is clear that it does not represent the current normative perspective of the contemporary American legal system. Title VII[10] places significant restrictions on workplace speech which creates a hostile environment,[11] and courts do not evidence any serious inclination to use the First Amendment to restrict these aspects of Title VII.[12]

The situation with regard to broadcasters is very different. Self-regulation by broadcasters is a response to the threat of regulation by the Federal Communications

[7] For the general theory of this point, see Robert Post, "Between Governance and Management: The History and Theory of the Public Forum," 34 UCLA L. *Rev.* 1713 (1987). For an elaboration of the point in the specific context of university speech codes, see Robert C. Post, "Racist Speech, Democracy, and the First Amendment," 32 *Wm. & Mary L. Rev.* 267, 317–25 (1991).

[8] Jacobson and Schlink, *supra* note 6.

[9] *See, e.g.*, Cynthia Estlund, "Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem," 2006 *S. Ct. Rev.* 115 (criticizing the Supreme Court for underprotecting public employees' free speech rights and undervaluing the public interest in hearing what they have to say); Cynthia L. Estlund, "The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law," 1 *U. Pa. J. Labor & Empl. L.* 49, 73 (1998) (describing "the workplace as a uniquely valuable setting for speech and as an important satellite forum for public discourse").

[10] Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e.

[11] *See* Jacobson and Schlink, *supra* note 6.

[12] Arguments that Title VII does violate the First Amendment have been made, generally by scholars with very different politics than Estlund's. *See, e.g.*, Kingsley Browne, "Zero Tolerance for the First Amendment: Title VII's Regulation of Employee Speech," 27 *Ohio N.U.L. Rev.* 563 (2001). For cites to the literature, see *id.* at 576 n. 77.

Commission (FCC). American constitutional law currently accepts a number of distinct rationales for regulating the content of broadcasting, most especially for prohibiting the broadcast of indecent speech during certain hours of the day when children are likely to be in the audience. One traditional justification concerned spectrum scarcity;[13] in these days of the Internet and of a virtually infinite number of cable channels, that rationale has become less and less convincing. The justification that presently retains pride of place is the one offered in the *Pacifica* case,[14] in which the Court reasoned, roughly, that because broadcasting is a powerful method of socializing the young, it is necessary to regulate broadcasting to ensure that its intrusion into the home does not disrupt the transmission of essential community values from parents to children. Any such disruption would undermine the very decency and civility that public discourse in a democracy requires to fulfill its function of democratic legitimation.[15]

PM: So you read *Pacifica* to permit limits not only on indecency but also on some sorts of "hate speech"? If so, is it a special limitation on broadcast "hate speech," an exception from what you call "the paradox of public discourse," that there seems to be no way for the state under the prevailing interpretation of the First Amendment to uphold civility rules in public discourse, although a minimum of civility rules might seem to be necessary for public discourse to function properly?

RP: This is currently a matter of constitutional speculation, but my guess is that if the FCC imposed on broadcast television the kind of regulations that Jeremy Waldron is talking about – limitations designed to provide members of vulnerable groups the "assurance" necessary to go about their lives in a secure and dignified manner[16] – and these limitations were defined in a suitably precise and limited way, those regulations would be upheld by the courts. But that's merely a prediction. Such a conclusion would be consistent with the rationale of *Pacifica*. Of course, a court that disagreed with *Pacifica* might reach a different conclusion about the extent to which enforcement of community norms might be necessary to sustain the function of public discourse.

The Internet, in contrast to broadcasting, is understood to be a medium of communication in which adults can control the participation of children by filters and other devices, so that adult communication on the Internet cannot be regulated to make it appropriate for the socialization of children.[17] The Internet is therefore for constitutional purposes analogous to media such as newspapers and movies. *Pacifica*'s justification for content regulation, which sounds in the socialization of children, drops out of the picture.

[13] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388–91 (1969).

[14] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[15] Robert Post, "Community and the First Amendment," 29 *Az. St. L.J.* 473 (1997).

[16] *See* Jeremy Waldron, "Hate Speech and Political Legitimacy," Chapter 16 herein.

[17] Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

PM: In your previous work, notably your book *Constitutional Domains*,[18] you have distinguished the model of democratic self-government, in which "autonomous wills" are coordinated and reconciled, from the form of social organization that you label "community." Public discourse may operate very differently, and be subject to very different regulation, in these two settings. Could you explain the tension between democracy and community and how they can be reconciled?

RP: The scope and nature of public discourse depends upon the scope and nature of what is "public." In my work, I contrast the social formation of the "public" with the social formation of what I call "community."

I define "community" as a social structure that inculcates common norms into the identities of its members.[19] Only feral children grow up outside communities. Normal human beings, as George Herbert Mead explained, are raised in a community that socializes them into its norms. All normal human beings "internalize" these norms, so that they become part of the structure of their personality.[20] Normal human beings know how to treat other human beings within their culture, how to distinguish friends from enemies, how to evince respect and contempt, and so on. The same norms that are powerfully built into the structure of individual personalities are also powerfully built into the collective identity of the community, so that there is a continuous symmetry between collective and individual identity. I use the term "community" to refer to this deep and inevitable form of social solidarity in which ongoing processes of socialization ensure that social norms reciprocally define individual and collective identity. Building on Mead's work, I think of community as a primal and indispensable form of social organization. It creates identities; it creates values; it creates structures of attitudes and motivations; it creates social solidarity and unity that allows for group identification, and so on.

The social formation of the "public" is not at all like this. The public is a space that encompasses many communities. This idea was developed in America through sociologists, particularly at the University of Chicago in the early years of the twentieth century, who were studying major urban metropolitan areas in which there were many distinct communities.[21] Take the complex and diverse city of Chicago. It encompassed neighborhoods in which persons congregated from distinct communities, from Italy, Poland, Slovakia, neighborhoods in which there lived primarily Jews, or African Americans, or White Anglo-Saxon Protestants (WASPs), and so on. Each of these distinct communities possessed a unique identity, a particular form of social solidarity based on particular customs, traditions, histories, and norms. Yet these various neighborhoods somehow had to come together to govern the common

[18] Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Harvard University Press 1995).

[19] *Id.* at 300.

[20] Robert Post, "Between Democracy and Community: The Legal Constitution of Social Form," in *Nomos XXXV: Democratic Community* 163 (John W. Chapman & Ian Shapiro eds., NYU Press 1993).

[21] *See* Post, *supra* note 3.

metropolitan area of Chicago, which was a vast space that embraced many diverse communities. The common space of what I call the "public" is that into which persons enter as they leave their insular neighborhoods and communities and seek to work together with those who have been socialized into distinct norms. Because we are a multicultural nation, we have been forced in the United States to forge a healthy public space in which persons from diverse neighborhoods can meet each other, on terms of equality and mutual respect, *outside* of their respective communities. Of course the public space would be neither safe nor equal if persons entering it would automatically be subject to the norms of an alien community.

As the need for a safe and neutral public space became increasingly apparent in the third decade of the twentieth century, which is to say as WASP dominance of the public sphere that had heretofore been accepted as natural began to weaken, we developed in the United States a First Amendment doctrine designed to ensure that the state would remain neutral with respect to the enforcement of community norms within public discourse, which is to say within those forms of speech necessary for the common project of democratic self-governance. The First Amendment sought to ensure that public discourse was safe and welcoming to all individuals; it refrained from suppressing speech that might be inconsistent with the norms of any particular community. The First Amendment ensured not merely a marketplace of ideas, but also a marketplace of communities.

The key case in this development was *Cantwell v. Connecticut*,[22] which interpreted the First Amendment to hold that in public discourse we meet each other as equal persons who are immune from the condemnation that might be imposed by the norms of an alien community. Even if communicating according to the norms of a speaker's own community profoundly insults and demeans another, because the community norms of an addressee regard such communication as offensive and degrading, the First Amendment will nevertheless typically prohibit the law from enforcing the community norms of an addressee.

Our unique separation of church and state is a good example of the way in which we have interpreted our Constitution to ensure a public space that remains permanently outside the domain of any single community. The Establishment Clause does not prohibit the establishment of religion because we are an irreligious nation. To the contrary, we are the most religious of all modern developed nations. We instead prohibited the establishment of religion because religion was so important to Americans in the eighteenth century and because they understood that they were so religiously diverse. Each sect was afraid that it would come under the control of another, alien sect. They therefore agreed that *no sect* would be able to seize control of the common resources of the federal government. The Establishment Clause guaranteed that the federal government would remain neutral ground, and hence

[22] 310 U.S. 296 (1940) (setting aside breach of the peace convictions of Jehovah's Witnesses proselytizing on the sidewalk).

that religious practices could safely remain voluntary and privatized with respect to federal control.

Norms of civility, by which we distinguish speech that is hateful from all other forms of speech, are like the tenets of a religion. Different communities have different norms of civility, and hence they classify different forms of speech as hateful. In the 1940s, when the notion of public discourse was being constructed by our Supreme Court, multiple communities were seen as vying for control of the public space. The upstanding decent people on the right side of the tracks wanted to prohibit one form of one discourse, whereas the working classes wanted to ban a different kind of discourse, and the churches wanted to suppress yet a third form of discourse. Which form of civility would the law impose to control public discourse? The Court's answer was that no form of civility could be imposed.

Precisely because in the United States community was fragmented, precisely because there was deep, sincere, and divisive disagreement about the forms of speech that should be prohibited as hateful, the Court adopted a rule that was analogous to the Establishment Clause. It said that *no* community could seize the power of the state to impose its own norms on public discourse. That is the true meaning of such reiterated but fundamentally odd Supreme Court maxims as "one man's vulgarity is another's lyric,"[23] or "one man's amusement teaches another's doctrine."[24] The Court is not really advocating a kind of hopeless relativism. In many contexts the law distinguishes vulgarities from lyrics, amusements from doctrines. These distinctions, however, turn on community norms, and what such maxims really mean is the First Amendment will not permit such norms to be enforced within public discourse.

Underlying this marketplace of communities is one additional and important qualification. Karl Polanyi once argued that any marketplace must be "embedded" in a larger community.[25] That principle also applies to the marketplace of communities. If one is going to tolerate different forms of speech, that toleration itself must reflect an image of the public good; it must reflect a particular normative image of the good state that is democratically responsive to the public opinion of its citizens. Absent such an image, public discourse cannot perform its allotted function of underwriting democratic legitimacy. So without an image of a state like, say, Hungary, an image of a social order that is larger and more encompassing than any single particular community within Hungary, there is no reason for particular Hungarians to leave their own particular communities to participate with strangers to make a public opinion that will direct the larger Hungarian state. There is no reason to tolerate alien communities at all. One can see here that the whole idea of democratic self-governance is itself a community norm that must be sustained through typical forms of community socialization, including specifically democratic

[23] Cohen v. California, 403 U.S. 15, 25 (1971).
[24] Winters v. New York, 333 U.S. 507, 510 (1948).
[25] *See generally* Karl Polanyi, *The Great Transformation* (Farrar & Rinehart 1944).

education. And this, in turn, means that if the toleration of incivility fundamentally threatens the community norms that sustain democracy itself, then the logic I have been explicating no longer applies.

In the United States, therefore, courts always face a dilemma. With respect to any particular government regulation enforcing a civility rule within public discourse, it can be argued either that enforcement of the civility rule is necessary to sustain the community life of the nation, so that striking down the regulation would ultimately undermine democratic self-governance, or that, to the contrary, the enforcement of the civility rule violates the tolerance required by democratic self-determination, so that allowing the regulation needlessly displaces and therefore damages democratic self-governance. One sees this dilemma endlessly reiterated within American jurisprudence.

PM: Do you think this model can work only in the United States?

RP: Habermas argues that it can work in Europe. Habermas's idea of "constitutional patriotism" is quite relevant to what I have been saying.[26] Habermas believes that one can have loyalty to an entity that is defined by inclusiveness and difference. He initially based his notion of constitutional patriotism on the United States, which at one point he considered an appropriate model for Europe.

PM: Your model seems to have both a normative and a descriptive/cultural element. The normative element requires that the state respect the authorship of everyone in the public discourse; the cultural/descriptive element holds that everyone accepts that others might have different views about civility rules in the public discourse but that in the background there is something common that holds people together in some shared enterprise.

RP: That's right; there is some *unit* that defines public discourse. If we protect public discourse so that we might engage in "self-government," we must first ask who the "self" is that seeks to govern. If we answer "the people," then we must join with Rousseau, who properly observes that we must first "examine into that by which a people became a people; for, on this . . . rests the true foundation of society."[27] However we define "the people" who have thrown themselves together into the common enterprise of self-government through the perpetual formation of public opinion, the success of democratic self-government requires that the unit we define must

[26] *See* Jürgen Habermas, "Struggles for Recognition in the Democratic Constitutional State," in Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* 225–6, 203–36 (Ciarin Cronin & Pablo DeGrieff eds., Ciarin Cronin trans., MIT Press 1998). Frank Michelman describes "constitutional patriotism" as naming "a motivational disposition . . . of attachment to one's country, specifically in view of a certain spirit sustained by the country's people and their leaders in debating and deciding disagreements of essential constitutional import." Frank Michelman, "Morality, Identity and 'Constitutional Patriotism'," 76 *Denv. U.L. Rev.* 1009, 1022 (1999).
[27] Jean-Jacques Rousseau, *A Treatise on the Social Compact, Or, the Principles of Political Law* 18 (J. Murray 1791).

necessarily share a common commitment to, at a minimum, the community norm of self-determination as the proper form of social solidarity. The implication is that democracy is always founded on some larger notion of an encompassing community that creates the public and that requires common collective authorship.[28] Without this normative premise, I think it will be very hard to construct a coherent concept of freedom of speech. Somehow the preconditions for loyalty and tolerance must be constructed on the basis of antecedent forms of social solidarity, on some form of community.

PM: Do you mean that this normative premise provides a precondition for Hungary or Central European and Eastern European countries generally if they want to construct a coherent concept of freedom of speech, and that countries in which the cultural elements that you described are missing are not, or cannot be, legitimate democracies?

RP: I don't know. I don't know enough about what it is like to live in a democracy like Russia or Hungary. Do citizens there experience authorship? Or do they feel oppressed no matter what party is in power? In my country, George W. Bush was in power for eight years and he did many things I abhorred. Nevertheless, I did not and could not refuse to accept an identification with my government. My loyalty transcends the particular actions of a particular party, however much I disagree with the actions it may be taking. My relationship to my government is based upon a larger time horizon than the Bush presidency. Does that larger time horizon exist in Russia or Hungary? If it does, then you have the resources to construct a real democracy.

PM: How might a country go about developing the two cultural elements of loyalty and tolerance if they are meager or underdeveloped?

RP: I think that an important resource is collective memory. There has to be a continuous story of national development and ideals. In this country, our tradition of freedom of speech is itself an essential collective memory that inspires loyalty and tolerance. And I suspect the same would be true for many European countries. If they don't have such a story, if they don't have the resources for collective memory – and this is István Rév's point about Hungary[29] – it will be very difficult to create the normative resources for public discourse and the marketplace of communities. Without some larger community value, nothing will constrain the exercise of raw power, which frequently does not experience the need to be either tolerant or loyal.

Another way of saying this is that in the United States we believe that even the positive enactments of the state are ultimately accountable to the most deeply held norms of the community that underwrites the state. This is the area of our

[28] *See* Robert Post, "Democracy, Popular Sovereignty, and Judicial Review," 86 *Cal. L. Rev.* 429 (1998).
[29] István Rév, *Retroactive Justice: Pre-History of Post-Communism* (Stanford University Press 2005).

doctrine we call substantive due process, which constrains state action on the basis of fundamental traditions and values.

PM: At the gay pride parade in Budapest in 2009 (a topic to which I will return), the government protected the marchers very professionally. That shows both an ability and a certain political commitment to do so, indicating that the cultural element of tolerance is developing in Hungary.

RP: The example would be powerful if the government were acting to demonstrate toleration for speech with which it radically disagreed. Holmes put this most dramatically when he said that the true test of guarantees of freedom of speech turns on "freedom for the thought that we hate."[30] But note that such tolerance cannot be only for progressive causes. There must be tolerance for speech hated by the left as well as speech hated by the right.

PM: Yes, obviously.

RP: Not obviously.

PM: For many people not obviously.

RP: There are many who would construct asymmetries between the toleration of the left and the right. In fact we heard this position articulated in our symposium.[31]

PM: I wonder how complete this model of unregulated discourse between competing communities is. Suppose community A has civility rules under which members are not only free to engage in anti-gay speech, for example, but even required to do so, whereas community B, in this example, a gay community, has a norm of respecting the freedom of speech even of community A, which is engaging in "hate speech" aimed directly at community B. Then it is not really a fair fight. Can the state intervene in such circumstances?

RP: Once again, it is important to avoid a picture in which the state either acts in an aggressive and intolerant way or is paralyzed and cannot act at all. In the United States, as I mentioned, the regulation of speech is quite fragmented and discontinuous. The government can intervene in some contexts, but not in others. In the workplace, rules against anti-gay speech are permissible. So communities are not in this sense equal in the workplace; we permit the suppression of some forms of uncivil speech. But public discourse is a limited and specialized form of communication in which communities must politically be regarded as equal. The reason why we impose such odd rules on public discourse is that it is the precise location in which the "self" in "self-government" is created. It is the location in

[30] United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).
[31] Post is referring here to an international workshop on "hate speech," organized by Jeremy Waldron, that took place at NYU Law School on October 23–24, 2009. Eds.

which we collectively decide what is and what is not fundamental. And if that question is already decided and imposed upon public discourse, then we lose the capacity collectively to think through the problem. That is why the state cannot intervene to tip the scales within public discourse.

Notice also, however, that even though we prevent the state from regulating public discourse in the name of a community norm, we nevertheless freely allow the state to participate within public discourse as a speaker. The state is a frequent, powerful, and loud participant in public discourse. We respect a president who stands up and asserts we should treat each other with civility and respect and that we should raise the tone of public conversation.[32]

PM: I have heard you elsewhere mention the example of the U.S. government expressing support for civil rights by issuing a commemorative stamp in honor of Martin Luther King. That's also forceful speech.

RP: Precisely so.

PM: But in the public discourse, under the prevailing First Amendment model, special protection of certain groups is not possible.

RP: For speech purposes. The state can adopt affirmative action programs; it can regulate conduct in many ways. But as a general matter the First Amendment prevents the state from restricting what people do and do not *say* in public discourse, although this generalization has exceptions. There are limits that the Court has found it necessary to impose. The way I conceptualize those limits is that the social form of community is logically and sociologically prior to that of democracy. So if incivilities occurring in public discourse threaten to undermine the very idea of a democratic community, if they threaten to undermine the norms of civility that allow public discourse to serve its function, the Court will permit regulation. But what is permissible will be a very thin form of regulation at the margins, and we will characterize unprotected speech with labels like fighting words,[33] or "true threats,"[34] or incitement to imminent violence.[35] These are marginal cases, but they do definitely exist, and they teach us an important lesson. They stand for the proposition that the Court will allow the maximum possible degree of freedom that is

[32] For two strikingly direct governmental condemnations of what most would characterize as hate speech, see the statements approved by the houses of the U.S. Congress in 1994 condemning a November 1993 speech by Khalid Muhammad of the Nation of Islam at Kean College in New Jersey. H.R. Res. 343, 103d Cong., 2d Sess. (1994) (condemning the speech as "outrageous hatemongering of the most vicious and vile kind"); 140 *Cong. Rec.* S687 (February 2, 1994) (adopting by a vote of 97–0 an amendment expressing the sense of the Senate that the speech "was false, anti-Semitic, racist, divisive, repugnant and a disservice to all Americans and is therefore condemned").

[33] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[34] *See* Virginia v. Black, 538 U.S. 343 (2003); R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992); Watts v. United States, 394 U.S. 705 (1969).

[35] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

compatible with the survival of the democratic community.[36] So not even in public discourse is there anything like "absolute protection." Not even close.

PM: The examples you give all turn on the context of the speech.

RP: Most fundamentally, they turn on the legal characterization of the speech act at issue. Courts typically ask whether a particular speech act constitutes an effort to participate in public opinion formation, or whether it instead is really a threat, or a fight, or an incitement to immediate illegal action. These characterizations are intuitive and pre-theoretical, and, as you say, they are very influenced by context. Many of the most basic First Amendment judgments turn on such pre-theoretical acts of classification.

Here's an example. As I have mentioned, there is an essential difference between state regulation of speech within a managerial domain and within public discourse. But if a soldier in a military barracks is writing his Senator complaining about his commanding officer, should the speech act be classified as within the managerial domain of the military, in which case it can be punished because inconsistent with the discipline required for the effective functioning of the military, or should it be classified as the public discourse of a citizen petitioning his government? This is a normative question, and it is the kind of pre-theoretical determination that is constantly made and continuously underlies First Amendment doctrine. If speech is within the managerial domain of the military, it can be regulated as hate speech. Hate speech between soldiers can be and is suppressed insofar as it is inconsistent with the mission of the military. When such speech is within public discourse, by contrast, it is relatively immune from state regulation. Often hard cases within public discourse are handled by courts classifying speech as outside public discourse.

PM: Do you mean to imply that democracies must allow people to engage in "hate speech" so long as "hate speech" is expressed within the public discourse, otherwise they undermine their legitimacy regardless their cultural context?

RP: I was surprised at a recent conference[37] to hear several speakers say that each country should regulate hate speech in its own way. This is not the usual way in which I have heard this question discussed, which tends to be in a universalist register. It is argued that hate speech either does or does not come within a universal right to freedom of speech, and hence it is either suppressible in every state or in no state. This cosmopolitan approach is consonant with a highly internationalist doctrine of human rights that extend universally around the globe. The thought that hate speech may be constitutionally protected in one country but not in another seems inconsistent with a global vision of rights.

[36] On the concept of "democratic community," see Post, *supra* note 20.

[37] Post is referring to a conference based on the contributions to this book which took place at the Cardozo School of Law on May 13, 2010. Eds.

My own view, I should hasten to say, is highly contextualist I believe that "A" can be a right in country "B" but not country "C" if the history, customs, traditions, and political circumstances of the two countries are relevantly different. Until this conference, I have always considered myself as something of an outlier for taking this view.

I rest my own contextualism on the conclusion that it does not make much sense to speak of a right of freedom of speech *simpliciter*. To speak of a simple right to speech, one would have to be able to distinguish speech from action. But no such distinction exists, because all words are also deeds. "Speech" and "action" are not distinct natural categories that exist in the world. Instead we determine the reasons why we wish to protect speech, and we then classify as speech those transactions that serve these reasons. The fundamental question for us is therefore what purposes we wish to serve by protecting speech. This is the way, for example, Fred Schauer talked about freedom of speech in his 1982 book,[38] which set the modern agenda for thinking about First Amendment jurisprudence

For a variety of reasons I will not go into now, I do not think that the search for truth is particularly helpful in defining which speech acts are protected.[39] Nor do I think, even though the late great Ed Baker would have disagreed,[40] that the value of autonomy is particularly helpful as a guide to protecting speech, because it is too vague and broad-gauged. What seems to me most useful in describing the actual shape of constitutional protections throughout the world, not just in the United States, is the thought that we protect freedom of speech because we believe that certain kinds of communications must be free if democracy is so succeed as a form of governance.

Roughly speaking, the thought is that democracy rests on the value of self-governance It must mediate between individual and collective autonomy We do this through the medium of public opinion. Public discourse is the technical legal term used to describe the speech acts necessary for public opinion to mediate between individual and collective autonomy. In a culturally heterogeneous society, free participation in public discourse is a necessary but not sufficient condition for my faith that my government can be responsive to my beliefs We reinforce this faith with a wide range of institutions, ranging from elections to juries, designed to tether the state to public opinion. This suggests that the right to freedom of speech is logically and sociologically dependent on an anterior right to democratic participation

[38] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982)

[39] For a general discussion, see Robert Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence," 88 *Cal. L. Rev.* 2353 (2000).

[40] In his chapter in the current volume, Baker rests his skepticism regarding regulation of hate speech on two propositions that are central to much of his writing about freedom of speech: that the legitimacy of the state depends on its respect for people's equality and autonomy, and that, as a purely formal matter, the state only respects people's autonomy if it allows them to express their own values in their own speech C Edwin Baker, "Hate Speech," Chapter 3 herein

or self-rule This turn suggests that international human rights instruments have it conceptually backward.

If there is a right to participate in the formation of public opinion, that right exists to make the state more democratically legitimate. This creates something of a paradox. The content of this right is exquisitely contextual, because which forms of speech will and will not make the state more democratically legitimate is in part an historical question. Yet the right is also formal, because it extends equally to all who are subject to democratic rule.

It could be that participation in opinion formation in certain ways, in certain countries, in certain national contexts, destabilizes democracy rather than legitimizes it. Legitimacy is a contingent historical condition. The right of participation is a formal universal right. The two therefore fit uneasily together. The formal right exists so long as it serves the contextual value. That is why, at root, one might adopt a contextualist position about the regulation of hate speech. In some contexts, hate speech might so delegitimize democracy as to justify excluding hate speech from the formal definition of freedom of speech; in other contexts, excluding hate speech from the right of freedom of expression would constitute a paradigmatic example of censorship. It all depends.

As a formal matter, we can say that suppressing hate speech in public discourse contradicts the formal right of participation. It prevents persons from participating in a process of public-opinion formation in ways that would make the law responsive to them. With respect to such persons, the state has *pro tanto* ceased to be legitimated, because it has excluded them from the process of public-opinion formation. There is thus always a steep cost to prohibiting the participation in public discourse of those who wish to engage in hate speech. The default rule should therefore be that hate speech should not be excluded from public discourse. But there is another side to the question. It could be that the costs of hate speech to the overall democratic legitimation of the nation are so high that the default rule should be overturned. This is a matter of particular historical contingencies and circumstances.

PM: Your discussion of public discourse offers one test of legitimacy: the results of the democratic process are legitimate only if all communities have participated in the discourse that produces the relevant consensus or decision. That in turn disables the state from proscribing certain messages, including "hate speech." Julie Suk provides a different account with regard to France, arguing that after World War II, the very legitimacy of the republic required outlawing racist speech and Holocaust denial.[41]

RP: I can't speak to the particular historical claims that Julie makes. I know that Patrick Weil has offered an analogous account. In the abstract, of course, we can

[41] Julie C. Suk, "Denying Experience. Holocaust Denial and the Free-Speech Theory of the State," Chapter 8 herein.

say that to the extent that a state firmly commits to a particular identity, so much so that it prohibits persons from thinking or communicating about any other identity, then it *pro tanto* ceases to be a democratic state because it refuses to be responsive to what its citizens are actually thinking and so withdraws from the project of self-governance Julie has contrasted the French state's refusal to be neutral with the impotence of the American state, which she regards as effectively paralyzed by a misconceived commitment to neutrality that is mandated by the First Amendment For the reasons I've already discussed, I think this contrast is overdrawn. The First Amendment prohibits content discrimination in the civil and criminal regulation of public discourse. But as a general matter, the American state is far from neutral. The American state takes substantive positions all the time. It affirms civil rights, equality, toleration, and so forth. Consider our regulation of workplace actions and speech. Consider our stamps and monuments. Consider the ongoing expression of American government officials about issues of race and toleration. Consider the rules and regulations that the American state imposes on the army, on government institutions, on contractors, and so on. No one should confuse the American state with a neutral state. What is true is that the American state will not regulate public discourse through civil or criminal sanctions in ways that are based on content So the contrast between us and the French is actually much smaller than I think Julie implies.

PM: So to ensure legitimacy and self-government, the government cannot intervene in the public discourse through civil or criminal sanctions in ways that are based on content – other than in exceptional situations.

RP: It can and does intervene in public discourse in the sense that the government itself *speaks* in public discourse. But you are correct that a concern with democratic legitimation prevents it from using civil and criminal sanctions to regulate public discourse except in very unusual situations

PM: All right. And what about the claim that another way for the state to achieve legitimacy is by excluding certain messages from the public discourse?

RP: Jeremy Waldron makes an analogous point. For him, democratic legitimacy does not require including in public discourse attacks on accepted "fundamentals" as to which there is no longer a meaningful, ongoing debate. Jeremy's position presupposes that we agree about the fundamentals; that they are not controversial. In his model, something like in the old picture of Patrick Devlin,[42] the legitimacy of the state depends upon enforcing what we already all agree upon.[43] Such a position would have much to recommend it if in fact there was universal agreement about what was "fundamental." But, as in Devlin's case, those who advocate for

[42] Patrick Devlin, *The Enforcement of Morals* 10 (Oxford University Press 1965).

[43] *See* Waldron, *supra* note 16

the enforcement of fundamentals are most apparently attempting to discredit and exclude those who precisely disagree with their view of fundamental values In the context of hate speech, we are by hypothesis addressing a situation in which many persons deny "fundamental" principles and wish to speak in ways that are inconsistent with them. This suggests to me that in fact we do not all agree on such fundamentals at all. Waldron of course concedes that there is not unanimity on these principles, stating only that "these matters are more or less settled."[44] But this is a significant concession, and it seems to imply that ultimately his claim is that such principles *should be* fundamental and beyond dispute. That amounts to the proposition that persons should be prevented from communicating because in our view they have nothing of value to say.

PM: Let me turn to a specific example involving "hate speech." In Budapest in 2008, extreme right-wing Internet sites encouraged "counter-demonstrators" to block the gay pride parade, by force if necessary. At the parade itself, "counter-demonstrators" were throwing rocks, acid-filled eggs, and bottles when they could get close enough, and many of them were shouting homophobic and anti-Semitic epithets. Let's assume that at the parade some people did not call for stopping the parade, by force if necessary, or for physically hurting participants of the parade, but they did express their homophobic and racist ideas. Would, or should, such speech be protected under *Brandenburg*?[45]

RP: It would be helpful closely to parse the case that you put. First, there are marchers who wish to express their point of view, which concerns pride in gay culture. Presumably their message is that gay culture should be accepted in Hungary. The parade is in this sense the public expression of an idea. A central principle of freedom of speech is that the state cannot suppress expression of an idea in public discourse merely because it disagrees with that idea. This principle follows from the thought that public discourse is the medium within which democratic will is formed, so that if the state were to control which ideas could be expressed in that medium, it would no longer be responsive to a democratic will. The right to express this controversial idea in the parade should therefore be protected.

Second, a parade is not simply words. It is not abstract text. It is a material manifestation that can cause physical effects, like trash, traffic jams, noise, and so on Most communicative acts have physical dimensions of this kind. Loudspeakers cause sound, movie houses cause congestion and fire hazards, newspapers cause litter, DVDs consume chemicals, and so on. How the necessary physical dimensions of communication can be regulated without compromising freedom of speech is a continuous and complex problem. In the context of parades, this problem includes

[44] *Id*

[45] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that speech advocating violence or lawlessness is constitutionally protected "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

how parades can be reconciled with traffic control, pedestrian safety, commercial and other usages of street space, and so on. On the constitutional side of the question is the importance of persons being able to deploy the medium of parades in ways normatively regarded as integral to the formation of public opinion.

Third, the message I convey in my parade or speech may provoke others to violent acts. The question posed here is whether the costs caused by speech — the negative reactions and effects — should be internalized by the speakers. Because participation in public discourse is so precious, we typically do not permit hecklers' vetoes.[46] The state protects the right to speak, even if private citizens who detest the speech seek to suppress it. Nevertheless, this presumption, like all default positions, has limits. At some point the state is justified in suppressing speakers if their speech will cause extreme and unavoidable harm to themselves or to others. Where this point is reached is a judgment call. If the state is too quick to suppress the speaker, we may be suspicious that the supposedly paternalist intervention is merely an excuse for siding with those who oppose the speaker. And yet the state is also derelict if it ignores the safety of the speaker altogether.

In the situation you propose, the counterdemonstrators have as much right as the initial paraders to voice sentiments, even unpopular sentiments that disagree with the marchers. They have every right to oppose gay rights. They have every right to show up and shout homophobic slogans. Just like gay persons have every right to burst forth from the closet and demand acceptance, so those who oppose gay rights have every right forcefully to assert that they do accept gays. There is a real public controversy between these two groups.

It follows that the state cannot suppress the anti-parade demonstrators on the ground that the state disagrees with their message, just as the state cannot stop the parade on the ground that the state disagrees with *its* message. The state must be neutral as between these messages. An antipathy to hate speech would not seem particularly helpful to me in guiding the state in how to proceed. What the state does need to do is to ensure that both sides of this demonstration can peacefully express their opinions. In doing so the state has the obligation of preserving the peace and of constraining those who would violate the peace. How in the end this must be done is a highly contextual question of judgment. But antipathy would seem to me to have little to do with it.

PM: Even if the "counter-demonstrators" would deny equal citizenship?

RP: The question of what does and does not constitute equal citizenship is itself a question of political opinion. Those who argue against naturalizing undocumented immigrants are taking a position about equal citizenship, yet it is also a position

[46] That is, we do not empower a hostile audience to silence a speaker through their very hostility and the harm or violence it threatens to produce. *See* Harry Kalven, Jr., *The Negro and the First Amendment* 140 (Ohio State University Press 1965).

in an ongoing political controversy. The question of which sexual practices should be regulated and which should be constitutionally immune from regulation is similarly a question about the political constitution of the state. For this reason, the counterdemonstrators should be entitled to express their message of disapproval.

If we assume, as might perhaps be inferred from your statement of the case, that the goal of the counterdemonstrators was not to express a message but to intimidate and harm participants in the gay parade, then we no longer have a symmetrical question of two parties each wishing to influence the formation of public opinion by conveying a message. Instead we have a question of one party wishing to communicate and a second party wishing through violence to prevent this communication. Nothing in the theory of freedom of speech would prevent the suppression of the latter. We would conceptualize the counterdemonstrators as attempting to commit a crime. The state is justified in preventing that crime. That the crime is expressive would no more implicate freedom of speech than would the attempt of the perpetuators of 9/11 to communicate a message immunize their crime under the First Amendment.

In short, it is one thing to have a counterdemonstration that seeks to convey a message, however hateful, and it is quite a different thing to use force and violence to prevent someone from speaking. There is no question at all that the state may and should prohibit the second.

PM: Sure, but what about "counter-demonstrators" who are engaged only in speech, but are expressing their views in a setting, in a context, when doing so directly and potentially decisively contributes to creation of the imminent danger of violence? Some people might not engage in violence except if they were encouraged to do so, either by Web sites urging that the parade should not be allowed to happen by any means necessary or by others on the spot, who might or might not be engaged in *express* incitement to violence.

RP: One question you may be now asking is when advocacy of illegal action can be regulated as illegal action. This is not a question that is unique to hate speech. It occurs in innumerable contexts. In the United States, we have for several generations subsumed this question under the so-called *Brandenburg* test that you mentioned earlier, which holds that the state cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[47]

The reason we require such a strict connection between advocacy of illegal action and illegal action is that we have learned through bitter experience that it is quite easy for a state to postulate some causal connection between speech and subsequent illegal conduct, however attenuated, and to use this connection as a pretext for suppressing speech which it wishes to silence because it disagrees with its content. During World War I, the United States Supreme Court, per Justice Holmes, allowed

[47] *Brandenburg*, 395 U.S. at 447.

speech to be suppressed if it merely had the "tendency" to cause future illegal conduct, and on this ground the state savagely suppressed the expression of all kinds of antiwar sentiments.[48] From the perspective of the United States, therefore, the question is whether the counterdemonstrators in your example would pass or fail the *Brandenburg* test.

Your example raises real difficulties in the theory of freedom of speech. There are many ambiguities that course through the case law. The *Brandenburg* test requires judgments that are necessarily discrete and contextual, and so subject to abuse. And while courts without a doubt read the relationship between speech and violence with an eye to how acceptable they find the speech,[49] this suggests that judicial judgments are made by fallible human beings. As a general matter, however, I cannot see how these difficulties are connected to the question of hate speech. I do not see why we would not apply in the context of hate speech the same rules for connecting speech to illegal conduct that we would apply in any other context.

PM: A possible reason for special rules for connecting speech to illegal conduct in the context of "hate speech" may be that such speech can create imminent danger of violence even if the speaker claims that he/she did not intend to incite those actions, he/she only wanted to express his/her opinions. How would you conceptualize the connection between speech and the imminent danger of the sort we are talking about that speech can create or directly and decisively contribute to?

RP: Analogous difficulties are created in all situations in which the *Brandenburg* test applies. It used to be said that the speech of even insignificant communists was like a spark that carried the potential of igniting the flame of revolution. I fail to see why hate speech presents a situation that is uniquely complicated.

PM: This discussion supports the view that, as you said earlier, responses to "hate speech" should be contextual. Given that perspective, do you think it would be possible to develop international standards for the regulation of "hate speech"?

RP: I myself tend to be skeptical toward efforts to implement universal standards. Universal standards tend to be articulated at such a high level of abstraction, and to be filled with so many exceptions and qualifications, as to lose the capacity to guide and control state action. In my view, the impulse to regulate hate speech, and the degree of immunity it will claim from regulation, will depend upon such particular and historical circumstances as the need of specific countries to ensure freedom of speech to underwrite democratic legitimation. The greater the need of a nation for mechanisms of democratic legitimation, the more freedom of speech it will allow.

[48] *See, e.g.*, Debs v. United States, 249 U.S. 211 (1919).

[49] *Compare* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), *with* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), *and* Virginia v. Black, 538 U.S. 343 (2003).

We should also recognize that the significance of rules of civility will vary from country to country. The fundamental diversity in the nature and meaning of civility rules has been demonstrated by my colleague Jim Whitman.[50] The need to allow freedom of speech will always be balanced against the need to enforce civility rules, and these balances will work themselves out differently in different countries. The balance will necessarily be path-dependent and particular.

PM: Could there be a universal definition of "hate speech"?

RP: We can always construct a definition. The question is whether the definition will do any work. In law, we have to define hate speech carefully to designate the forms of the speech that will receive distinctive legal treatment. This is no easy task. Roughly speaking, we can define hate speech in terms of the harms it will cause: physical contingent harms like violence or discrimination; or we can define hate speech in terms of its intrinsic properties: the kinds of words it uses; or we can define hate speech in terms of its connection to principles of dignity; or we can define hate speech in terms of the ideas it conveys. Each of these definitions has advantages and disadvantages. Each intersects with first amendment theory in a different way. In the end, any definition that we adopt must be justified on the ground that it will achieve the results we wish to achieve.

PM: There can be many definitions then. If so, are all of them arbitrary?

RP: Any definition of "hate speech" will be constructed to serve a particular purpose. We must evaluate the status of "hate speech" so defined in order to determine whether it achieves what we wish to accomplish and whether the harms of the definition will outweigh its advantages.

PM: Toby Mendel argues that Articles 19 and 20 of the International Covenant on Civil and Political Rights could be the basis of a consistent standard, though courts are not clearly interpreting these provisions.[51]

RP: I am skeptical that these Articles in fact articulate a useful standard. If we look only at Article 19, for example, what is "the freedom of expression"? Is it the right of a student to talk in class regardless of the instruction of her teacher? Is it the right of a lawyer to talk in court regardless of the instructions of a judge? Article 19 contains such general language as to be practically useless. In order to determine the actual parameters of "freedom of expression," we will have to define the values served by freedom of speech, and these values will invariably become context specific.

[50] James Q. Whitman, "Enforcing Civility and Respect: Three Societies," 109 *Yale L.J.* 1279, 1383–90 (2000).

[51] Toby Mendel, "Does International Law Provide For Consistent Rules on Hate Speech?," Chapter 22 herein.

To take another example, Article 19 requires freedom of speech "regardless of frontiers."[52] What does that mean? If freedom of speech is, as I suggest, logically and sociologically connected to democratic self-determination, how can its regulation be separated from the units of self-determination? Almost all international statements I have seen suffer from immediate and obvious deficits of this kind. They join together goods that are in tension and assume that all is well. They are very nice in the abstract, but in the concrete world of law they do not seem to me to provide much analytic clarity, precision, or guidance.

Article 20 suffers from analogous ambiguities. To know how to interpret Article 20, one would need a persuasive theory of meaning of words like "hatred" and "incitement" and "hostility." As we interpret these words differently, so Article 20 will come to be more or less in tension with other principles of freedom of speech.

PM: You emphasized that education specifically should contribute to sustaining the deeper structures of democracy. What sort of educational policies would you suggest?

RP: Amy Gutmann has a good discussion of this question in her book *Democratic Education*.[53] Democratic education is necessary in order to sustain our commitment to and understanding of the value of democratic self government. It is necessary in order to inculcate the practical virtues that democratic citizens must exercise if democracy is to succeed. These virtues include sustaining the balance between toleration and self-authorship; maintaining faith in the long run dependence of state policy upon evolving public opinion despite short-run defeats; balancing national imperatives against local needs and values, affirming the priority of civilian authority as against the temptations of military force; prizing peaceful transitions of power; protecting freedom of speech; and so on. There are innumerable necessary democratic virtues that we take for granted. All are premised on the belief that a stable democratic polity is of fundamental value and must be preserved. This belief doesn't come from God, from human rights instruments, from natural law, or from nature It comes from community commitments that instilled through socialization and education.

Public education in a democracy takes many forms. There is primary socialization, which occurs in the family and in elementary institutions of education. There is the continuous education of the state, which occurs through public education, public monuments, art, prizes, stamps, and street names. There is the peer-to-peer education that occurs through forms of civic engagement. And so on

[52] Section 2 of Article 19 provides: "Everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." International Covenant on Civil and Political Rights, art 19(2), December 16, 1966, 999 U N.T.S. 171.

[53] Amy Gutmann, *Democratic Education* (Princeton University Press rev. ed. 1999).

PM: Would it be acceptable if the U.S. government gave awards for the best achievement in the last year in the struggle against prejudice and the promotion of diversity?

RP: Of course. Restraints on what the government chooses to praise are chiefly political. We give prizes for cultural achievement at the Kennedy Center; we give prizes for essays on a many different topics, we award research grants; we endow lectures, and so on. Courts do not typically review such activities [54]

PM: Law, too, can be educative. Some defend the prohibition of "hate speech" on the ground that it has considerable educational value, instructing the public about certain important virtues.

RP: It is entirely true that law is educational.[55] But law is not *only* educational. The law also regulates and controls behavior. Thus the criminal law not only expresses society's extreme condemnation and abhorrence of certain conduct, it also uses the state's monopoly on legitimate violence to prevent that conduct. It does this through stigmatization as well as punishment. If law were merely expressive, then it would make sense to regard hate speech regulation as a form of public education. On this view, hate speech regulation would do no more than express our society's abhorrence of intolerance and bigotry. It would teach health lessons in social respect and solidarity. Hate speech regulation would be no different than a president's exhortation to mutual respect.

But because law is much more than merely expressive and educational, because it is also punitive and regulatory, the view you describe does not rest on an adequate account of hate speech regulation, which also penalizes participation in public discourse by those who hold certain views condemned by the state. This not only sends a message of intolerance – that those who believe certain ideas are not welcome within processes of public opinion formation – but it also undercuts democratic legitimation with respect to such persons. It stands as an open invitation to exclude from public-opinion formation those who hold views that a majority believes should be beyond the pale. These are very dangerous and costly moves in a democracy. The expressive message of hate speech regulation is thus very complicated. It can breed intolerance as easily as tolerance, it can promote resentment and social instability as easily as it can promote solidarity and respect. The actual effects of hate speech regulation will be highly contextual, depending upon national traditions, histories, and so forth.

PM: One last question about education, connecting the need for education and the need for the cultural preconditions for legitimacy through public discourse. To

[54] Post, *supra* note 5; National Endowment for the Arts v. Finley, 524 U S 569 (1998)

[55] Robert Post, "The Social Foundations of Privacy Community and Self in the Common Law Tort," 77 *Cal L. Rev* 957 (1989).

what extent can countries like Hungary create these preconditions by developing history books that can support a common sense of history?

RP: One cannot create collective memory merely by writing excellent history. But certainly excellent history is a helpful aid in the creation of a stable narrative of collective memory. I tend to think that stable historical narratives both depend upon a healthy respect for facts and upon a compelling and perhaps non-historical sense of the meaning of facts. If the political victors in Hungary can change the facts and the significance of those facts every few decades, the nation cannot establish a coherent narrative about its fundamental values. Respect for facts thus cabins the efforts of the state unscrupulously to manipulate history.

PM: Since Hungary became democratic in 1989, it should be able to develop a common sense of history, including an at least largely shared interpretation and conceptualization of our history in the last century.

RP: That would be wonderful.

PM: Suppose *two* countries are involved; for example, consider the Israel/Palestine conflict.

RP: Israel and Palestine have two different historical narratives. Dialogue between Israel and Palestine is complicated by the difficulty of persons talking to each other out of two entirely distinct historical frameworks that create incompatible visions of justice and of the future. There is no easy or simple solution to that problem.

PM: Slovakian and Hungarian historians and history teachers have also been working for years on common history books in which they try to harmonize their distinct national narratives.

RP: That's very hopeful.

PM: A standard argument for leaving "hate speech" unregulated is that the most effective response is more speech. But it raises the question whether the state should go further than engaging in counterspeech; should it encourage and facilitate private counterspeech? Katharine Gelber argues that the state and the political community of a country should enable members of the targeted minority – say, Roma in Hungary – to answer forcefully.[56] What do you think about this argument?

RP: It depends on exactly what this argument means. Should the president of Hungary speak out against anti-Roma hate speech? Of course. Should the Hungarian parliament speak out against such hate speech? Of course. Should the Hungarian prime minister? Of course. I can't think of any argument against the state participating in the formation of public opinion in this way. It is a separate question

[56] Katharine Gelber, "Reconceptualizing Counterspeech," Chapter 11 herein.

what it might mean for the state to "facilitate" the speech of the Roma themselves. Much would depend upon the exact steps taken. So, for example, to permit Roma to use public fora but to prevent their opponents from using the same fora would be quite problematic. Yet for the state to offer remedial assistance to groups otherwise excluded from public discussion would present an entirely different question.

PM: What do you make of Charles Lawrence's suggestion that when racist, or homophobic, or religiously bigoted speech occurs at a university, then the whole university must react? That proposition can be analogized to the idea that the whole state has to do something.

RP: There is a sense in which I regard Lawrence's observation as correct, and a sense in which I regard it as very misguided. It seems right to me that a university is a community and it must defend itself as a community. Racist attacks within a university are the concern of the entire community, and those who speak for the community have an obligation to defend it by articulating the values proper to the community. But if universities were to be held "responsible" for the speech of their members, there could be no academic freedom.[57] If a university were to be held accountable for the ideas and expressions of its members, it could not cede to its faculty or students the freedom to think independently, and this independence is required by the very idea of a university. So in most cases a university should not be held accountable for the racist speech of its faculty or students (as distinct from its administrators), but at the same time a university must assume the responsibility for ensuring the conditions of mutual respect and safety necessary for the functioning of a university. By analogy, no state that imagines itself as democratically responsive to public opinion can assume responsibility for what is said within public discourse. Nevertheless, any democratic state must ensure that public discourse remains sufficiently civil as to perform its function of democratic legitimation.

PM: What about the argument that restricting alleged defamation of religions is necessary in order to protect religious sensibilities? Under your model of public discourse, how could we deal with the challenge posed by religious sensitivities?

RP: Religious sensitivity is fast becoming an increasingly salient problem in Europe. In my view, however, there should be no structural difference between our analysis of speech that is defamatory of groups (racist speech) and speech that is defamatory of religions (blasphemy). There are some very early and very poor opinions by the European Court of Human Rights[58] that seem to imply that speech offensive to religious sensibilities can be suppressed as blasphemy, but these opinions would seem to cede control of public opinion formation to religious groups, and in a civil society

[57] *For the Common Good: Principles of American Academic Freedom* (Matthew W. Finkin & Robert C Post eds., Yale University Press 2009)

[58] *See* Robert Post, "Religion and Freedom of Speech: Portraits of Muhammad," 14 *Constellations* 72 (2007)

that is not defensible. It makes little practical sense because religious sensibilities can be, and indeed frequently are, logically incompatible with each other. What offends Catholics does not offend Muslims, and vice versa. Sometimes what is offensive to one religion is affirmatively necessary to another. Oliver Cromwell famously issued a directive regarding the religious liberty of the Catholics in Ireland: "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted."[59] For these reasons, any test that would seek to determine the acceptability of public speech by reference to subjective religious sensibilities would instantly entangle itself in absurdities and self contradictions of the worst kind. The test for the acceptability of public speech must in the end turn on a neutral secular standard.

PM: The United Nations General Assembly and Human Rights Council still approved resolutions aimed at "combating defamation of religions."[60]

RP: I confess I don't understand the meaning of such a resolution. If I say that Jesus Christ is the only true God, the statement could simultaneously affirm my deepest faith and defame Islam. An international standard of defaming religion would instantly lead to heated internal contradictions.

PM: Hopefully our global community will not restrict freedom of speech in such an absurd way.[61] Thank you so much for the interview.

RP: Thank you, Peter.

[59] McDaniel v. Paty, 435 U.S. 618, 631 n. 2 (1978) (Brennan, J., concurring) (quoting Oliver Cromwell).

[60] *See, e.g.*, UN General Assembly, Office of Public Information, Press Release GA/SHC/3966, *Third Committee Approves Resolution Aimed at "Combating Defamation of Religions"* (November 12, 2009), *available at* http://www.un.org/News/Press/docs/2009/gashc3966.doc.htm. The Resolution passed by a vote of 81 to 55, with 43 abstentions. *Id.* The United States voted against the Resolution "because it would not agree that prohibiting speech was the way to promote tolerance." *Id.* Support for this resolution has weakened over the years. It was approved again in March 2010, but by the narrowest margin to date. U.N. Human Rights Council, Res. 13/16, Rep. of the Human Rights Council, U.N. Doc. A/65/53 (Mar. 25, 2010). The vote was 20 to 17, with 8 abstentions.

6. In 2011, the Human Rights Council adopted a resolution condemning violence, discrimination, and incitement to religious hatred without reference to "defamation of religions." U.N. Human Rights Council, Res. 16/18, Rep. of the Human Rights Council, A/HRC/16/2, chap. I (Mar. 24, 2011). *See also* Robert Evans, "Islamic Bloc Drops U.N. Drive on Defaming Religion," Newsmax.com, Mar. 24, 2011, *available at* http://www.newsmax.com/Newsfront/article/2011/03/24/id/390671.

2

Is There a Case for Banning Hate Speech?

Bhikhu Parekh

During the past few decades, there has been an almost universal trend toward banning so-called hate speech directed at individuals or groups on the basis of their race, ethnicity, nationality, or religion. The prohibited forms of expression vary from country to country, but the basic thrust is the same. Britain bans abusive, insulting, and threatening speech; Denmark and Canada prohibit speech that is insulting and degrading; and India and Israel ban speech that incites racial and religious hatred or is likely to stir up hostility between groups. In the Netherlands, it is a criminal offense to express publicly views insulting to groups of persons. Australia prohibits speech that offends, insults, humiliates, or intimidates individuals or groups, and some of its states have laws banning racial vilification. Germany goes further, banning speech that violates the dignity of an individual, implies that he or she is an inferior being, or maliciously degrades or defames a group.

Many of these countries claim to be guided by or find support in the International Covenant on Civil and Political Rights, particularly Article 20, which requires a ban on "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination."[1] Some of them are also signatories to the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4 of which requires parties to "condemn all propaganda or organisations based on theories of racial superiority and incitement to racial discrimination and acts of violence" and to eradicate "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing

[1] International Covenant on Civil and Political Rights, art. 20, G.A. Res. 2200 (XXI), U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

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thereof."[2] Although the United States restricts some speech on the grounds that it threatens national security, constitutes obscenity or child pornography, presents a danger of an imminent breach of peace, or is patently offensive and directed at a captive audience or used in a workplace, it is, with the recent exception of Hungary, the only country to resist the trend to ban hate speech.[3] Even here, however, such a broad interpretation of the First Amendment of its Constitution is of relatively recent origin, going back no further than the 1960s, and several writers have argued that the country needs to reconsider its position.[4]

I. DEFINING HATE SPEECH

In the course of enforcing their laws, different countries have punished or sought to punish different instances of speech, of which the following are a small sample:

1. Shouting "Niggers go home," making monkey noises, and chanting racist slogans at soccer matches.[5]
2. "Islam out of Britain. Protect the British people."[6]
3. "Arabs out of France."[7]

[2] International Convention on the Elimination of All Forms of Racial Discrimination, art. 4, G.A. Res. 2106 (XX), U.N. GAOR 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 21, 1965).

[3] Some argue that although the origins of this trend can be traced to the late 1910s, it emerged in its current forms in the Supreme Court's judgment in Brandenburg v. Ohio, 395 U.S. 444 (1969), which held that speech may be curtailed only when there is "incitement to imminent lawless action." *See* Rodney Smolla, *Free Speech in an Open Society* (Vintage 1992). The United States made an extensive reservation when ratifying the International Convention on the Elimination of All Forms of Racial Discrimination.

[4] For a sympathetic exploration of the differences between European and American approaches to free speech, see Aernout Nieuwenhuis, "Freedom of Speech: U.S.A. vs. Germany and Europe," 18 *Netherlands Quarterly Human Rights* 195 (2000). For a comparative overview by an American law professor critical of the American position, see Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," Chapter 13 herein. *See also* Stephen H. Shiffrin, *Dissent, Injustice and the Meaning of America*, ch. 9 (Princeton University Press 1999).

[5] *See* Michael Walker, "The Mask of Sufferance Removed," *Irish Times*, Oct. 23, 2000.

[6] Englishman Mark Norwood was prosecuted, convicted, and fined for displaying in his apartment window a poster with this slogan and a picture of the World Trade Center. The European Court of Human Rights rejected his complaint that this was a breach of his right to freedom of expression. Norwood v. United Kingdom, App. No. 23131/03, decision of Nov. 16, 2004, Eur. Ct. HR (Second Section). The case is summarized in Conference on Security and Cooperation in Europe, *Countering Terrorism, Protecting Human Rights* 228 (Organization for Security and Cooperation in Europe 2007). For one typical example of this sentiment, consider a recent post in the comments to an online article. Under the subject line "Arabs out of France," the writer states: "The arabs wanted France out of their countries. France left and then the arabas infest France with crime and reactionalry ideas and no contributions to science or art.; Throw them into the Mediterannean and let them swim back to Morocco and Algeria." (All spelling errors are in the original.) Comment to Michael T. Klare, "A Planet on the Brink: Economic Crash Will Fuel Social Unrest," *AlterNet*, Feb. 24, 2009, *available at* http://www.alternet.org/rights/128716/a_planet_on_the_brink_economic_crash_will_fuel_social_unrest/?comments=view&cID=1146119&pID=1145646#c1146119.

4. "Serve your country, burn down a mosque."[8]
5. Blacks are inherently inferior, lecherous, predisposed to criminal activities, and should not be allowed to move into respectable areas.
6. Jews are conspiratorial, devious, treacherous, sadistic, child killers, and subversive; want to take over the country; and should be carefully watched.
7. Distribution by a political party of leaflets addressed to "white fellow citizens" saying that, if it came to power, it would remove all Surinamese, Turks, and other "undesired aliens" from the Netherlands.[9]
8. A poster of a woman in a *burka* with text that reads: "Who knows what they have under their sinister and ugly looking clothes: stolen goods, guns, bombs even?"[10]
9. Salman Rushdie's *Satanic Verses* was banned in several countries for causing distress and grave offense to Muslims and stirring up hostility to them.[11]
10. Holocaust denial is an offense in Germany, France, Austria, the United Kingdom, and several other countries.[12] The offense generally includes denying the existence, extent, or enormity of the Holocaust.[13] In some countries, "trivializing" it is also an offense.[14]
11. The Council of Europe has adopted a Framework Decision requiring member states to criminalize "publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a

[8] A card with this text was received by a member of the House of Lords in 2005 and referred to the police for prosecution. *See* Lords Daily Hansard, vol. 674, col. 220 (Oct. 11, 2005).

[9] *See* Glimmerveen and Hagenbeek v. Netherlands, Oct. 11, 1979, Application No. 8406/78 (Eur. Comm'n on H.R.).

[10] This poster, headed "The Burka Bombers," was described by Lord Falconer of Thoroton during debate on the racial and religious hatred bill in the House of Lords. *See* Lords Daily Hansard, vol. 674, col. 168 (Oct. 11, 2005).

[11] *See generally* Daniel Pipes, *The Rushdie Affair. The Novel, the Ayatollah, and the West* (Transaction Publishers 1990).

[12] Raffi Berg, "The Fight Against Holocaust Denial," *BBC News*, Apr. 14, 2005, *available at* http://news.bbc.co.uk/2/hi/europe/4436275.stm.

[13] *See generally* Kevin Boyle, "Hate Speech – The United States versus the Rest of the World," 53 *Maine L. Rev.* 488, 497–99 (2001). The European Court of Human Rights has rejected free speech challenges to these laws. *See, e.g.*, Lehideux and Isorni v. France, 55/1997/839/1045, 1998 VII Eur. Ct. HR 92 (1998).

[14] The German Constitutional Court argued that the remarks of a Holocaust denier (David Irving) robbed the German Jews of their "individual and collective identity and dignity" and created a "social and political environment in which they cannot feel an integral part of the German society." Holocaust Denial Case, Entscheidungen des Bundesverfassungsgerichts [Federal Constitutional Court] 1994, 90 *BVerfGE* 241 (Germ.).

group or a member of such a group."[15] This has provoked considerable public protest by European intellectuals.[16]

These and related forms of prohibited speech are not all of the same kind. Some of them express or advocate views but do not call for action. Some are abusive or insulting but not threatening. Some express dislike of a group but not hatred, and some of those that do are so subtle as not to be obviously abusive or insulting. Some take a demeaning or denigrating view of a group but wish it no harm and even take a patronisingly indulgent attitude to it. Because forms of speech can be offensive and morally unacceptable without amounting to hate speech properly so called, they should not all be lumped together and treated in an identical manner. Hate speech is a distinct kind of speech, and much conceptual confusion is created – and the net of prohibited speech unduly widened – by subsuming all forms of uncivil and hurtful speech under it. We may therefore rightly proscribe hate speech without also proscribing insulting, abusive, denigrating, and similarly objectionable speech. This does not mean that we may not choose to ban the latter as well, but rather that the reasons for doing so are not necessarily the same as those that apply to hate speech. Even the term "hate speech" is unsatisfactory because it stresses hatred, an extremely strong emotion. However, given that it is widely used and there is no obvious alternative, I shall continue to use it in this chapter and give it a reasonably precise meaning.

Hate speech expresses, encourages, stirs up, or incites *hatred* against a group of individuals distinguished by a particular feature or set of features such as race, ethnicity, gender, religion, nationality, and sexual orientation. Hatred is not the same as lack of respect or even positive disrespect, dislike, disapproval, or a demeaning view of others. It implies hostility, ill will, severe contempt, rejection, a wish to harm or destroy the target group, a silent or vocal and a passive or active declaration of war against it. Hate speech has three essential features. First, it is directed against a specified or easily identifiable individual or, more commonly, a group of individuals based on an arbitrary and normatively irrelevant feature. To say that one hates all human beings or all living beings is not hate speech. It is nondiscriminatory in the sense of not being targeted against a particular section of humankind and includes even the speaker; is too abstract to mean much, if anything, in practice; and implies no concrete course of action. To say that one hates murderers and wants them all locked up or executed is not a case of hate speech either. It advocates a policy and does not incite to action, and it is based not on a normatively irrelevant ascriptive identity, but on what the individuals involved have done.

[15] Council of the European Union, Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, art 1.1(c), 2008/913/JHA (Nov 28, 2008)

[16] *See* Timothy Garton Ash, "The freedom of historical debate is under attack by the memory police," *The Guardian*, Oct 16, 2008, at 27

Second, hate speech stigmatizes the target group by implicitly or explicitly ascribing to it qualities widely regarded as highly undesirable. Stigmatization is a matter of degree. The negative qualities might be considered remediable and contingent, in which case the speaker is implying that the target group is required to rid itself of them to be accepted. Or they might be considered an inherent part of the group's identity, in which case it is permanently condemned.

Third, because of its negative qualities, the target group is viewed as an undesirable presence and a legitimate object of hostility. It cannot be trusted to be a loyal member of society and presents a threat to its stability and well-being. Because society would be better off without it, it may legitimately exterminate or expel the target group. And if that should prove impossible, it may rightly discriminate against and tolerate it as an unavoidable evil confined to a shadowy existence on the margins of society. Thus, hate speech encourages and purports to justify discrimination.[17]

Although hate speech breathes the spirit of exclusion and violence, it does not necessarily or by definition result in violence or public disorder. The speaker or his/her audience might consider it prudent not to act on it. Also, the targeted group might either exercise self-restraint or be too timid or intimidated to fight back. It is therefore a mistake, commonly made, to define hate speech as only that which is likely to lead to public disorder and to proscribe it because or only when it is likely to do so. What matters is its content – what it says about an individual or a group – and its long-term effect on the group and the wider society, rather than its immediate consequences in terms of public disorder.

Hate speech is often expressed in offensive, angry, abusive, and insulting language, and its impact generally depends on that, but it is not necessary that it should be so expressed. Hate speech can also be subtle, moderate, nonemotive, even bland; its message conveyed through ambiguous jokes, innuendoes, and images. Although its mode of expression provides a useful clue to its nature, it is not the only one. Every form of speech occurs within a particular historical and cultural context, and its content, import, insinuations, and moral and emotional significance are inseparable from, and can only be determined in the light of, that context. An utterance that appears innocent on the face of it might not in fact be so, or one that is harmless in one context might be a case of hate speech in another. Holocaust denial, for example, is not by itself a case of hate speech. Although untrue, it is an opinion like any other and should be tolerated in a free society in the same way that we put up with believers in witchcraft and a flat earth. However, it could also be a coded way of saying that Jews cannot be trusted; would resort to any tricks, including invention of imaginary horrors, to serve their interests; represent a subversive presence and that no shared life is possible with them; and that they therefore represent a hostile

[17] It is striking that both Article 20 of the International Covenant on Civil and Political Rights and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination make "incitement to discrimination" central to hate speech. *See supra* nn 1 & 2 and accompanying text

and subversive group deserving of discriminatory treatment and worse. It then has all three features of hate speech.

If we examine the cases of prohibited speech listed earlier in terms of these three criteria, we see that some of them constitute hate speech and others do not. Examples (1) to (7) are all cases of hate speech. Examples (2) and (3) do not explicitly stigmatize British Muslims and French Arabs, but they do so implicitly. The two groups are presented as an undesirable presence because of the kind of people they are believed to be, that is, because of their customs, practices, alleged lack of loyalty to the host society, inability to integrate, and so on, and hence the French and British societies are seen as better off without them. Although (1) through (7) differ in the degree of active ill will they express, making some weak and others strong forms of hate speech, they all meet its basic test. Item (8) is a comment on the person's dress, but also an ill-disguised reference to Muslim women as not to be trusted. It arouses suspicion and mistrust but not necessarily hatred of them. *The Satanic Verses*, item (9), neither ascribes undesirable qualities to Muslims nor impugns their ability to share a common life. It mocks Prophet Mohammed and casts doubt on the authenticity of some of the Qur'anic verses but does not advocate hostility to Muslims, and is not a case of hate speech.[18] As observed earlier, (10) could be a case of hate speech depending on its context and import. As for (11), its first part is loosely worded and too wide. It does not distinguish clearly between expressing a view and incitement to action, and it covers a large number of historical events. However, it is only intended to provide a framework for future legislation, and much depends on how the member states translate it into law.

II. WHY HATE SPEECH IS UNACCEPTABLE

The importance of free speech is too obvious to need elaboration. Speech occurs at many levels, including interpersonal relations, public life, and intellectual inquiries. At each level it plays a vital but different role, and its defense is based on somewhat different grounds. While making a general case for free speech, we also need to take full account of these differences and may rightly allow a greater degree of it in one area than in others.

First, free speech is the indispensable basis of free thought and critical self-consciousness. When it is denied or severely curtailed, the human capacity to think, and all that is distinctive to human beings, is undermined. At the most basic level, thought is inseparable from speech. Speech is objectified thought, and thought is articulated in speech and represents a form of speaking to oneself. When individuals externalize and express their thoughts and give them a worldly reality, they systematize and impose a measure of order on them, become clearer about their content,

[18] As the European Commission of Human Rights concluded. *See* Choudhury v. United Kingdom, in 12 *Human Rights L. J.* 172–173 (1991).

create a vitally necessary space or distance between themselves and their thoughts and feelings, and are able to reflect on them critically.

Second, free speech is the basis of a meaningful human life. It is through the medium of speech that individuals disclose themselves, appear before others, are recognized and affirmed by them, and acquire a sense of who they are. They communicate their thoughts and feelings, build bonds, construct shared memories, and create and sustain a rich and varied individual and collective life. When speech is drastically curtailed and subjected to all manner of constraints, human relations remain shallow and fragile; are marred by ignorance, misunderstanding, dishonesty, and falsehoods; and lack the capacity for transparency and permanence.

Third, free speech is just as vital in political life. It enables citizens to submit their beliefs and opinions to critical scrutiny, assists the formation of an informed public opinion and collective will, provides the only effective check on the government, creates a vibrant civil society, and in general ensures an easy and constant flow of ideas among citizens and between them and the government.

Finally, free speech is just as crucial to intellectual inquiries. It enables us to challenge inherited dogmas, critically examine different bodies of ideas, rise above our biases, pursue truth, expand the range of intellectual and moral sympathy, secure a firmer grasp of the grounds of our beliefs and practices, and develop vital human capacities.

Given that free speech is so central to human life, we rightly place a high value on it and protect and nurture it by making it a constitutionally protected right. It is not a natural right, one we possess "by nature," but a moral right we believe we ought to enjoy for the ontological, epistemological, moral, and other reasons mentioned earlier. Like all rights, it presupposes a moral community whose members share a broad consensus on fundamental human interests and are willing to accept the corresponding restraints and obligations. Because such a community alone makes rights possible, all rights including free speech have certain limits built into them. They must not undermine the moral community and must be balanced against other rights and values.

Although free speech is an important value, it is not the only one.[19] Human dignity, equality, freedom to live without harassment and intimidation, social harmony, mutual respect, and protection of one's good name and honor are also central to the good life and deserve to be safeguarded. Because these values conflict, either inherently or in particular contexts, they need to be balanced. Although we may rightly privilege some of them over others either in general or in particular contexts, none can be so absolutized as always to trump others. Even social harmony and national security, which are vital to the very existence of society, do not override

[19] For a valuable discussion, see Stanley Fish, *There's No Such Thing as Free Speech . and It's a Good Thing Too* (Oxford University Press 1994), especially chapters 8 and 9. *See also* Bhikhu Parekh,

the demands of human dignity and free speech, which is why we rightly refuse to sacrifice the latter even when faced with terrorist attacks. We want security and peace but not at all cost, and we do not wish to live in a society that can only be maintained by locking up everyone who arouses our suspicion or by subjecting convicted criminals, including terrorists, to inhuman and degrading punishment or torture. Every value makes claims that limit those of others, and every right is limited in its content and scope by other rights. This is as true of the right to free speech as of others, which is why it is subject to limits in all societies The important question is whether prohibition of the expression and promotion of hatred as defined earlier should be one of these.

Hate speech is objectionable for both intrinsic and instrumental reasons, for what it is or manifests and for what it does. It lowers the tone of public debate, coarsens the community's moral sensibility, and weakens the culture of mutual respect that lies at the heart of a good society. It views members of the target group as an enemy within, refuses to accept them as legitimate and equal members of society, lowers their social standing, and in these and other ways subverts the very basis of a shared life. It creates barriers of mistrust and hostility between individuals and groups, plants fears, obstructs normal relations between them, and in general exercises a corrosive influence on the conduct of collective life. Hate speech also violates the dignity of the members of the target group by stigmatizing them, denying their capacity to live as responsible members of society, and ignoring their individuality and differences by reducing them to uniform specimens of the relevant racial, ethnic, or religious group.

Because hate speech intimidates and displays contempt and ridicule for the target group, group members find it difficult not only to participate in the collective life, but also to lead autonomous and fulfilling personal lives. They lead ghettoized and isolated lives with a knock-on effect on their children's education and career choices. In Britain and many other European countries, blacks and Asians, for example, long avoided football matches because of the all-too-familiar racist chants. Some of them also resisted the temptation or the invitation to stand for elections because of the fear of racist insults. Targets of hate speech understandably feel nervous in public spaces lest they should be humiliated They are afraid to speak their minds and behave normally, and they worry constantly about how the negative stereotypes that others hold of them will lead them to interpret their words and actions. As a result, they are likely to feel alienated from the wider society, to lead shadowy lives, and to feel trapped in a cramped mode of being. When hate speech is allowed uninhibited expression, its targets rightly conclude that the state either shares the implied sentiments or does not consider their dignity, self respect, and well-being important enough to warrant action. In either case, the state forfeits its legitimacy in their eyes and weakens its claim to represent them and demand their loyalty.[20]

[20] The Canadian Supreme Court spells this out well in Regina v. Keegstra [1990] 3 S C.R. 697. Hate speech, it argues, creates discord in the community, harms the target group, infringes equality, and has only slight social value. *See also* Robert C. Post, "Racist Speech, Democracy and the First Amendment," 32 *Wm. & Mary L. Rev.* 267 (1991).

Hate speech is also unacceptable because of its likely long term consequences. It encourages a climate in which, over time, some groups come to be demonized and their discriminatory treatment becomes accepted as normal. Vicious and widespread hatred of a group does not spring up overnight. It builds up slowly through isolated utterances and actions, each perhaps trivial individually, but all cumulatively capable of coarsening the community's sensibility, poisoning the minds of the young, weakening the norms of civility and decency, and creating a situation in which it becomes common practice to ridicule, mock, malign, and show hostility to the target group and, over time, to others. The violence implicit in hate speech then comes to the fore, initially in isolated incidents but gradually gathering a momentum of its own. If anything can be *said about* a group of persons with impunity, anything can also be *done to* it This is because if a group can be treated with contempt, its interests and feelings are viewed as of no consequence. It is stripped of dignity, dehumanized, treated as belonging to an inferior species, and a moral climate is created in which harm done to it is seen as right and proper and does not arouse a sense of outrage. It is not surprising that, with some exceptions, Europeans, who witnessed the rise of Fascism and Nazism and watched the ease with which these movements created a racist climate that swept millions, should be some of the strongest advocates of the need for a timely ban on hate speech.

Even when a society does not travel all the way in this direction, the impact of hate speech can be considerable. It legitimizes and generates pressure for discrimination against the target group and provides moral support and encouragement to those inclined to discriminate. The target group is unable to relax and lead a life without fear and harassment. Some of its members either internalize their negative image and develop self-abasement and low self-esteem or compensate for it by becoming aggressive and self-righteous. They tend to avoid activities, occupations, and careers where they fear hatred, cannot be sure of equal treatment and basic respect, and have to watch out for signs of suppressed resentment and hostility. Although the moral and psychic injury that all this can cause, and the restricted life chances to which it leads, are not easy to identify and measure, they can be profound and real. We lose sight of these subtle and deeply damaging long-term consequences of hate speech if we concentrate only on, and judge it in terms of, the likely immediate threat to public disorder.

The argument that speech may be restricted only when there is "imminent danger" of violence also fails to probe further the idea of imminent danger. No action occurs in a historical vacuum, and every action produces consequences not inherently but against a particular background If a group came into existence urging people to "kill all elderly parents" or to "kill all beautiful women," its intended audience as well as its target group would think it was mad or joking and dismiss its utterances without a moment's thought But if it expressed similar sentiments about blacks, Jews, or

gays, the latter would feel intimidated and insecure, and the group's statements could provoke those so inclined, or their long-suffering victims, to resort to violence because of the deeply rooted prejudices against these groups built up over time. Imminent danger occurs against, and is imminent because of, the prevailing social climate, and consistency demands that we concentrate our efforts not only on fighting the immediate source of danger, but also on changing the climate.

III. THE ROLE OF LAW

Because hate speech is unacceptable for these and related reasons, it has no place in a decent society and deserves to be discouraged. The difficult and much-debated question is whether it should be not merely discouraged by moral and social pressure but prohibited by law. Although law must be our last resort, its intervention cannot be ruled out for several important reasons. Most obviously, assuming meaningful levels of enforcement and compliance, direct prohibition would reduce or eliminate speech that causes very real harm to the targets of such speech.

Second, a legal prohibition is valuable for the message it sends. Such a law reassures all members of society – not only the currently targeted group, but also other members of society, for every one of them can under certain circumstances be a target – that the state values them all equally and is committed to maintaining a civil public discourse and protecting their fundamental interests So far as the currently targeted group is concerned, the law legitimizes the state in its eyes, earns its trust, and acquires the right to its loyalty. It also lays down norms of civility and sends out clear messages concerning what is or is not an acceptable way of talking about and treating other members of society. Being a collective and public statement of the community's moral identity and guiding values, the law affirms and enforces these values, has a symbolic and educational significance, and helps shape the collective ethos.

Third, proscription of hate speech plays an important role in preventing political mobilization of hostility against particular groups. This is especially true if the limits are enacted before hate-based organizations have built up powerful networks and support and before their rhetoric has coarsened public sensibility. As I argued earlier, a climate of intimidation and violence against identified groups develops over time Once it takes deep roots and poisons the relations between different groups, law lacks a supportive public opinion and is either not enacted or not enforced or takes a drastic form and risks provoking widespread resistance. In the developing societies, and even in such mature democracies as Britain, France, Germany, and the Netherlands, it is common for politicians and political parties to outbid each other by pandering to base political instincts and provoking hatred of whatever group appears to arouse popular dislike. Banning hate speech discourages them from doing so and inflaming the all-too-easily aroused passions in pursuit of short-term gains Although other factors played a part as well, it is worth noting that British elections,

their media coverage, and political discourse in general have been healthier and more moderate as a result of the law proscribing incitement to racial hatred.[21] Similar things have happened in India, Germany, Austria, the Netherlands, South Africa, and elsewhere, in all of which crude expressions of racial and religious hatred have declined in recent years. This is not to say, of course, that these sentiments have disappeared or even substantially declined in these countries, but rather that public life is conducted in a more civil language, and that politicians appealing to such sentiments are generally treated with disdain by the general public and disowned by their leaders.

While agreeing that hate speech is morally and politically unacceptable, many writers oppose a legal ban on it, notwithstanding the foregoing benefits. Their reasons are varied, but the following six are the most common. On analysis, none is ultimately convincing.

First, free speech is a highly important value, indeed the lifeblood of democracy, and should only be restricted when the rights of other individuals, public order, and compelling public interest are at stake. The harm caused by hate speech is generally relatively minor in its intensity and extent, and even when it is serious, its tolerance is a small price to pay in the larger interest of a free and vibrant democracy.

Although the argument has some merit, for a comprehensive and undiscriminating ban on all forms of hate speech is often counterproductive and fraught with difficulties, the argument in its unqualified form is deeply flawed. Rather than talk of liberty in the abstract, we need to ask what sort of liberty or liberty to do what is restricted by a ban on hate speech. As Sir Frank Soskice put it during debate on the race relations bill in the British House of Commons, "What is the loss of liberty they fear? Is it other than the loss of liberty by the use of outrageous language to stir up actual hatred against most completely harmless people . . . for something they cannot possibly help?"[22] We rightly ban obscenity, libel, defamation, public display of pornography, and so forth, partly because of the harm they cause and partly because we believe that our public life should be guided by certain norms. It is not clear why these norms should not exclude utterances that intimidate, bring into contempt, provoke hatred of, and damage the dignity and life chances of sections of society Social harmony, public faith in the legitimacy of the political system, equality of treatment, and the right to live one's life without harassment and intimidation are also important values. It is difficult to see on what grounds free speech can be made a "preferred right" and allowed always to trump them. Free speech is the lifeblood of democracy when it advances reasoned arguments, subjects ideas and opinions to critical public scrutiny, exposes falsehoods, aims to arrive at a rational view of the matter, and so on. Hate speech does none of these In fact it weakens democracy

[21] The Public Order Act of 1986 outlawed "incitement to racial hatred", the prohibition was extended to incitement to religious hatred by the Racial and Religious Hatred Act 2006.

[22] Commons Daily Hansard, vol 711, col 938 (May 3, 1965)

by arousing passions and irrational fears, making sweeping and indiscriminate generalizations about groups, creating a sense of insecurity among target groups, and discouraging their political participation. Like free speech, mutual respect, spirit of tolerance, equal dignity, and unconstrained and enthusiastic participation in the conduct of public life are also the lifeblood of democracy.

Second, it is argued that evil ideas are best defeated not by banning them but by subjecting them to a critical scrutiny and confronting them with better ideas. The answer to hate speech is not less but more speech.[23] This argument makes a valid point but exaggerates it. It is true that respect for fellow human beings requires us to engage critically with their misguided but sincerely held beliefs, and that it is more effective in the long run to refute the basis of these beliefs than to suppress their public expressions. There are, however, limits to this approach.

The marketplace of ideas, on whose competitive scrutiny and fairness this argument relies, is not neutral and does not provide level playing fields. It has its biases and operates against the background of prevailing prejudices. When racist, anti-Semitic, and xenophobic beliefs are an integral part of a society's culture, they appear self evident, commonsensical, and obvious, and therefore enjoy a built-in advantage over their opposites. Indeed the latter rarely get heard, and if they do, they tend to be dismissed out of hand. Furthermore, a fair competition between ideas requires that they all enjoy equal access to the marketplace, including the popular media and other agencies through which they are communicated and critically engage with each other. This is rarely the case.

Even assuming that the market is or can be made neutral and equally accessible to all bodies of ideas, it is naive to imagine that false ideas will always lose in their battle with true ones.[24] Ideas do not operate in a social vacuum. They are bound up with interests, the prevailing structure of power, and so on, and the victory often goes to those bodies of ideas that enjoy the patronage of powerful groups or prey on people's fears and anxieties. Even as far as material products are concerned, competition does not ensure that quality triumphs over cheap and poorly made products. There is no

[23] *See, e.g.*, Collin v. Smith, 447 F. Supp. 676, 702 (N.D. Ill.) ("The ability of American society to tolerate the advocacy even of the hateful doctrines espoused by the plaintiffs without abandoning its commitment to freedom of speech and assembly is perhaps the best protection we have against the establishment of any Nazi-type regime in this country."), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978), American Civil Liberties Union, "Hate Speech on Campus" (Dec. 31, 1994) *available at* http://www.aclu.org/studentsrights/expression/12808pub19941231.html ("[W]here racist, sexist and homophobic speech is concerned, the ACLU believes that more speech – not less – is the best revenge.") *See generally* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., dissenting) (ascribing to the framers the view that "the fitting remedy for evil counsels is good ones").

[24] John Milton famously observed: "Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?" John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644). One hesitates to label Milton naive, nonetheless, the intervening centuries have done little to provide empirical support for this confident assertion. Frederick Schauer's chapter in this volume usefully discusses the shortcomings of the belief that "truth will out." *See* Frederick Schauer, "Social Epistemology, Holocaust Denial, and the Post-Millian Calculus," Chapter 7 herein.

reason to expect a different outcome at the level of ideas. This is not to deny the importance of the marketplace of ideas, but rather to argue that, like the market in general, it needs to be subjected to certain regulatory controls. This is what the ban on hate speech does. By allowing ideas to be freely expressed provided that they do not violate norms of mutual respect and civility, it ensures their fair competition, counters the weight of prevailing prejudices, and encourages the participation of those likely to be intimidated or alienated by hate speech.

Third, it is argued that a ban on hate speech inhibits and has a chilling effect on public discussion and debate, and that once we go down this road, we open the floodgates to all kinds of restrictions. The argument makes an important point. As the experiences of societies with a ban on hate speech show, people do sometimes feel inhibited and hold themselves back from making robust criticisms of and even expressing their views on the beliefs and practices of different groups. This happens because the ban on it is worded vaguely and applied inconsistently or in a biased manner. Given that the ban on hate speech is necessary for reasons mentioned earlier, the answer lies in rectifying these flaws and not in leaving hate speech unregulated.

The argument we are considering presupposes that an uninhibited freedom of expression is necessarily a good thing. There is no obvious virtue in allowing everyone to say anything that comes into his or her head and requiring those affected to put up with it. Speech can have social consequences that need to be balanced against its benefits; it cannot be absolutized or allowed to override any and all other values. Furthermore, this argument relies on the misleading metaphor of the slippery slope and the implied fear that once we go down a particular road, we would not know where to stop.[25] If this were true, we would not be able to make any exception to a principle or a value lest it should open the floodgates to others. We make such exceptions all the time; indeed human life, which is not a slope at all, let alone a slippery one, would be impossible unless we did so. When we distinguish between different situations on clearly stated grounds, we do not helplessly slide from one to the other. We ban defamation of individuals without jeopardizing fair critical comment, and we ban obscenity without discouraging acceptable forms of erotic expression. It is all a question of knowing the limits one may not cross. A ban on hate speech is no different.

Fourth, some critics of the ban on hate speech argue that it gives the state the right to judge the content of speech and to decide what sort of speech is good or bad and should or should not be allowed. In their view, this violates its moral neutrality, may skew political debate, and constricts individual liberty.[26] Although this argument

[25] Frederick Schauer, "Slippery Slopes," 99 *Harv. L. Rev.* 361 (1985).

[26] The principle that content-based restrictions are more suspect than content-neutral ones is entrenched in American First Amendment doctrine. For a description and defense, see Geoffrey R. Stone, "Content-Neutral Restrictions," 54 *U. Chi. L. Rev.* 46 (1987); Geoffrey R. Stone, "Content Regulation and the First Amendment," 25 *Wm. & Mary L. Rev.* 189 (1983).

rests on a justified fear of the state, it is flawed. It is not true that the state does not judge or has no right to judge the content of speech. Every state enjoys and exercises the right to limit speech in the interest of other equally important values, and it cannot do so without passing some judgment on its content. This is as true in the United States as it is elsewhere. First of all, the First Amendment places no requirements of neutrality when the government *itself* is the speaker.[27] Second, even in its regulatory capacity, the government need not always be neutral. When an American state bans public display of hardcore but not softcore pornography, commercial advertisements that tell blatant lies, release of military secrets, and libel of private individuals, it clearly judges the content of speech. To restrict speech is to restrict what may or may not be said, that is, its content and likely effect. While watching a film in a crowded cinema hall, the law stops me from shouting "fire" but not "rubbish" or "how moving."

Beyond a certain point, the moral neutrality of the state is itself problematic. A liberal state should not enforce a particular view of the good life on its citizens and should allow a free flow of ideas, but some values are so central to its moral identity that it cannot remain neutral with respect to them. A state committed to human dignity, gender and race equality, or the spirit of free inquiry cannot be neutral between forms of speech or behavior that uphold or undermine these values. This is why it teaches these values and not others in its schools, discourages and keeps a close watch on faith schools, supports or grants charity status to some organizations and activities but not others, and so on. As long as the ideas subversive of its central values remain confined to a tiny and eccentric minority or a matter of academic debate, and largely harmless, it should rightly leave them alone. But if they were to gain momentum and threaten its fundamental values, it should not remain an uninterested bystander. Ideally it should act earlier, but if that was not possible or effective, legal prohibition becomes necessary.

Fifth, it is sometimes argued that human beings are responsible and autonomous individuals, or at least that an assumption that they are such is the basis of a democratic society, and that they can and should be trusted to see through hate speech.[28] A ban on hate speech smacks of paternalism or moral authoritarianism, which should

[27] *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.") Justice Scalia, with his usual directness, has asserted that "[i]t is the very business of government to favor and disfavor points of view." National Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998). Robert Post explores this point in Chapter 1 herein.

[28] Ronald Dworkin, "The Coming Battles Over Free Speech," *NY Rev Books*, June 11, 1992, at 55. Dworkin explains that this constitutive, as opposed to instrumental, justification for freedom of speech has two dimensions.

> First, morally responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true and false in matters of justice or faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions.

have no place in a society of free and equal citizens. This objection highlights an important point, but it takes an idealized view of personal autonomy and ignores the conditions of its development. Human beings, even in a democracy, are not as autonomous and self-critical as it assumes; otherwise we would not be able to explain the centuries-long hold of racist ideas and religious bigotry, or the ease with which millions even in "mature" societies fell for and continue to fall for populist demagogues and their murderous political programs. Autonomy in the sense of a critical evaluation of ideas and forming one's convictions after a rigorous assessment of evidence and arguments is a matter of degree. Some develop it to a greater degree than others, and more so in some areas than in others, depending on their social background, education, and opportunity for self-development. We should not make the mistake of homogenizing our fellow citizens or taking an abstract and uniform view of autonomy.

Autonomy, further, is exercised under certain conditions. It requires, among other things, that one has equal access to different bodies of ideas so that one can judge and arbitrate between them. As we observed earlier, this is not the case. Some ideas are hegemonic and become part of a society's shared understanding whereas others lead a marginal existence, making it extremely difficult even for otherwise autonomous individuals to see through and resist the power of the former. In almost all societies, including the western ones, racism, sexism, nationalism, and xenophobia represent powerful currents of thought reflected in and regularly reinforced by the media. Not surprisingly, even the most self-critical liberals sometimes find it difficult to resist their appeal. It is because of these limits of individual autonomy that the law needs to lay down norms of decency. It does not ban ugly ideas per se, which are left free to circulate privately, but only when they take the form of publicly expressing and promoting hatred of, and poisoning relations between, individuals and groups.

Sixth, there is a body of interrelated practical objections to bans on hate speech. Law, it is argued, cannot by itself change people's attitudes and eliminate hatred. This is true, but it does not entail the required conclusion. Because law throws the society's collective moral and legal weight behind a particular set of norms of good behavior, it does have some influence on attitudes; its role is limited but nonetheless important. Besides, our concern is not so much to change attitudes in the first instance as to deny some of them public expression, and law is best equipped to achieve that. As Aristotle observed, ethics is a matter of social ethos, and the latter is shaped by habits developed through acting in certain ways. On the conventional

> [Second,] moral responsibility has another, more active, aspect as well: a responsibility not only to form convictions of one's own, but to express these to others, out of respect and concern for them, and out of a compelling desire that truth be known, justice served, and the good secured. Government frustrates and denies that aspect of moral personality when it disqualifies some people from exercising these responsibilities on the ground that their convictions make them unworthy participants.

Id at 56–7.

liberal view, our beliefs are the ultimate determinants of our behavior and are, or should be, a result of rational reflection. As Aristotle argued, the relationship between belief and conduct is reciprocal and complex. Our beliefs shape our conduct, but they are also in turn influenced by it By acquiring the habit of acting in certain ways, we build up an appropriate character and develop certain attitudes and ways of thinking. Law is primarily concerned with conduct, but it also shapes citizens' character, attitudes, and beliefs.

It is sometimes argued that banning hate speech drives extremist groups underground and leaves us no means of knowing who they are and how much support they enjoy. It also alienates them from the wider society, even makes them more determined, and helps them recruit those attracted by the allure of forbidden fruit.

This is an important argument and its force should not be underestimated. However, it has its limits. A ban on hate speech might drive extremist groups underground, but it also persuades their moderate and law abiding members to dissociate themselves from these groups. When extremist groups go underground, they are denied the oxygen of publicity and the aura of public respectability. This makes their operations more difficult and denies them the opportunity to link up with other similar groups and recruit their members.

While the ban might alienate extremist groups, it has the compensating advantage of securing the enthusiastic commitment and support of their target groups Besides, beyond a certain point, alienation need not be a source of worry. Some religious groups are alienated from the secular orientation of the liberal state, just as the communists and polyamorously inclined persons bitterly resent its commitment (respectively) to market economy and monogamy. We accept such forms of alienation as inherent in collective life and do not seek to redress them by abandoning the liberal state. The ban might harden the determination of some, but it is also likely to weaken that of those who seek respectability and do not want to be associated with ideas and groups considered so disreputable as to be banned, or who are deterred by the cost involved in supporting them. There is the lure of the prohibited, but there is also the attraction of the respectable.

It is sometimes argued that a ban on hate speech can easily become an end in itself and an excuse to avoid well-conceived antidiscrimination policies. Although this can happen, as arguably it has in France,[29] there is no obvious reason why it should As the cases of Britain, Netherlands, Germany, and Australia show, the ban on hate speech has gone hand in hand with a wider campaign to address the causes of racism, sexism, or homophobia by pressing for a well-worked-out strategy to tackle discrimination and disadvantage. This is not accidental and has a complex internal logic. Once people realize that ban on hate speech has made only a marginal

[29] For a helpful discussion of the (underenforced) prohibition on Holocaust denial in France, a country that is not "a model of success as far as racial equality is concerned," see Julie Suk, "Denying Experience Holocaust Denial and the Free Speech Theory of the State," Chapter 8 herein.

difference in their lives, they look for the deeper causes and see the need for an antidiscrimination struggle in other areas of life. The ban on hate speech alerts the target groups to other goals to aim at and gives it the confidence to fight for them by actively participating in public life.

Some critics of the ban argue that law is a blunt instrument and cannot define hate speech precisely enough to avoid two important dangers First, it is unlikely to stand up in a court of law and not only brings the law into disrepute, but also disappoints those whom it claims to help. Second, it could be misused by the government to suppress legitimate dissent and struggle for human rights and even to whip up fears of national disintegration and social disharmony for which minorities are blamed. Such abuses have occurred in Sri Lanka, apartheid South Africa, the erstwhile Soviet Union, and even in such democracies as India and Israel

This is a powerful argument whose force advocates of the ban do not always fully appreciate However, it is not as fatal as is sometimes made out It does not challenge the ban in principle, but rather its practicability. Law is a blunt instrument because it is necessarily articulated in terms of general categories, which cannot be sharply defined and distinguished, and because it cannot deal with the nuances and complexities of unique situations. This is true of all laws and is not unique to one banning hate speech. Because we cannot live without laws, we cope with their bluntness in three important ways First, we make them precise by defining the relevant concepts as sharply and unambiguously as humanly possible. The precision is never absolute and incontrovertible but adequate and reasonably workable. This is why hate speech must be defined with great care and distinguished from such vague expressions as offensive, hurtful, and distressing remarks, as I suggested earlier. Secondly, we entrust the enforcement of the criminal law to public authorities and expect them to initiate prosecutions with due regard to their likely results and the public interest. Thirdly, we rely on judges to apply the law and adapt it to the complex circumstances of each case with sensitivity and good judgment The resulting case law elucidates the law's key concepts, explores the full range of its meaning and implications, and builds up an appropriate tradition of discourse on it The First Amendment jurisprudence in the United States shows how the Supreme Court has wrestled with the concept of speech, at times rendered conflicting judgments, and over time built up a broad but not unquestioned consensus on what constitutes speech.[30] We should expect the same in relation to hate speech.

I might take the British experience to indicate how the ban on hate speech has worked in practice. Between 1987, when the Public Order Act 1986 Act came into effect, and 2004, there were sixty-five prosecutions for incitement to racial hatred. On three occasions, the Attorney-General had declined to give his consent to prosecution on grounds of public interest. Of the sixty-five prosecutions, forty-four resulted in

[30] *See generally* Eugene Volokh, "Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, 'Situation-Altering Utterances,' and the Uncharted Zones," 90 *Cornell L. Rev.* 1277 (2005).

convictions, twenty-six of these resulted in immediate sentences of imprisonment of between three months and two years, five in suspended prison sentences, and the rest in conditional discharge, fine, or community service. Five prosecutions resulted in acquittal, six were dropped by the prosecution for various reasons, and ten had other outcomes such as that the defendants were judged medically unfit or had absconded or died. These statistics show that the ban, if carefully drafted, can stand up in a court of law, has teeth, and can act as a check on hate speech.

The danger that the ban can be misused is real, but that does not undermine the case for it. It is interesting that the African National Congress, which had suffered much from such an abuse under the apartheid regime, continued with the ban on hate speech in a suitably revised form on establishing a democratic South Africa. Many laws, including those relating to public order and national security, are open to abuse, but that does not mean that we should dispense with them. Furthermore, repressive governments can easily invoke all kinds of familiar reasons to justify suppression of dissenting movements and minority protests. No doubt a ban on hate speech provides them with one legitimizing reason, but it is not the only one and its absence would not make any difference to their actions.

Determined governments are able to misuse the ban because it is formulated in vague terms and applied in a biased manner, and it is this that needs to be addressed. Given that the general point of the ban is to protect vulnerable groups against intimidation and violence, we could demand a more stringent judicial scrutiny when it is used for opposite purposes. An independent judiciary, a representative legislature, a popularly accountable government, a free press, and so on are our best protection against misuse of laws, including the ban on hate speech. Once these institutions are established, a ban has a good chance of success. If they are not, the ban is open to abuse as indeed are all other laws. We cannot, therefore, discuss it in the abstract or in isolation from the wider political institutions and culture

IV. CONCLUDING REFLECTIONS

I have argued that hate speech strikes at the root of the shared communal life and represents a gross misuse of the right to free speech. It breathes the spirit of aggression and violence, lowers the tone of public discourse, expresses and promotes hostility to a group of persons, subjects them to harassment and intimidation, inhibits their participation in communal life, and damages their sense of dignity and equal life chances. Although law has its obvious limits, it has an important role in discouraging hate speech. It affirms the community's commitment to equality and civility, sets standards of good behavior, reassures vulnerable groups, and prevents the normal intergroup conflicts and prejudices of a multiethnic society from getting out of control. Law is most effective and the risk of its abuse is considerably reduced when it is part of a wider antidiscrimination and conciliation strategy, is accompanied by

a campaign of public education, and is carefully drafted and directed against clearly defined forms of hate speech.

The role of law varies with society. Western societies have several mechanisms to cope with hate speech and its consequences, such as an open and competitive economy, a vibrant civil society, a reasonably cohesive and integrated society, a varied media representing a wide spectrum of views, and a plural and self-limiting public culture. They can, therefore, afford to assign law a relatively limited role. As their recent actions show, even they had to increase that role to cope with the rabid rhetoric and militant activities of right-wing organizations, joined now by their jihadist Islamist cousins spouting hatred of what the West most values.

So far as the developing countries are concerned, the situation could not be more different. Most of them are composed of ethnic, religious, and racial groups with little experience of working together and a long legacy of mistrust, ignorance, misunderstanding, and hostility. Rumors, jokes, inflammatory or ill-conceived remarks by politicians seeking short-term gains, and even reasoned criticisms made in the course of an uninhibited exercise of free speech can arouse deep-seated fears, trigger unrest, and undo years of good work in nation building. Extralegal mechanisms on which the developed societies rely are not yet strong enough to cope with the consequences of hate speech, making law a major instrument of collective action, at least until such time as the society acquires reasonable cohesion and stability and throws up informal mechanisms of control.

Context plays an important part in our assessment of the value of a law. Banning Holocaust denial has a particular meaning in Germany. It is part of reparative justice, a public statement of the country's acknowledgment of and apology for its past, a way of fighting neo-Nazi trends in German society, and so on. The ban is justified not only because Holocaust denial is a form of hate speech, but on other moral and historical grounds as well. This is also the case, albeit to a lesser extent, in some other European countries that have a history of rabid anti-Semitism. The ban has no meaning in India where there is no history of hostility to Jews and where anti-Semitism is not a problem. Although all forms of hate speech properly so called deserve to be discouraged, how strict a view we should take of different forms of it, how far we should resort to law, and whether the law should rely on civil remedies alone or should also involve criminal penalties are best decided in the light of the history and the prevailing circumstances of the society in question

Free speech flourishes and is indeed only possible under certain conditions, such as some degree of political stability, social stability, intercommunal harmony, and a culture of civility In their absence, the nervous society lacks both the confidence to live with dissent and vigorous debate and the ability to cope with their consequences. The ease with which western societies, including the United States, have in recent years introduced an extensive system of surveillance – some have even made praising or "glorifying" terrorism a criminal offense, and imposed or encouraged severe formal

and informal restrictions on free speech, shows how much their commitment to it i primarily a result of their social and political stability rather than their greater lov of liberty.[31] Political stability and social harmony are not external to free speech bu make it possible and lie at its very basis. When hate speech is banned to create and maintain these conditions, we restrict free speech not only in the interest of othe values, but also its own. Indeed, while restricting it at one level, we consolidate and deepen it at another.

[31] A polite but firm request from the White House was enough to "persuade" CBS, NBC, ABC, FOX, and CNN not to broadcast unedited videotapes by Osama Bin Laden in 2001. Bill Carter and Felicit Barringer, "Networks Agree to U.S. Request to Edit Future bin Laden Tapes," *N.Y. Times*, Oct 11, 2001, at A1. Network officials stated that Secretary of State Condoleezza Rice had not tried to "coerce" them, but had been, in the words of one executive, "very gentle, very diplomatic, very deft." *Id.* The official reason – that the tapes might be sending out secret messages – was widely known to be spurious as the Al-Jazeera Web site, easily accessible in the United States, continued to show them uncensored.

3

Hate Speech

C. Edwin Baker

Given the evils of hate, any argument for protecting hate speech is, at best, an uphill effort and, at worst, simply misguided. Many people either accept, or at least wonder whether they should accept, an argument that goes something like this:

> Anyone sensitive to the horror of genocide knows that hate pervades the atmosphere at such times. Few goals can rank higher than preventing genocide and the murderous racial conflicts presented to the world during the twentieth century. Lesser instances of race-based violence also should be prevented. It is difficult to find any value in the freedom to engage in racist hate speech. Important but ultimately less significant values such as free speech cannot, for any sensitive person, lead to any pause in outlawing the speech that contributes to these horrors. Exceptions to any free speech principle should be made for hate speech. Whether or not the ban will be effective in even a few cases to prevent genocide or racial violence, the mere possibility that it will more than justifies the ban.

As an advocate of almost absolute protection of free speech,* I should explain the grounds for my valuation of free speech and rejection of the just mentioned claim. That explanation, it turns out, is too ambitious for this essay. Nevertheless, Section II of this chapter describes but does not defend a theory of why racist or hate speech

The misguided nature of a common argument against the absolutist position in respect to free speech and in favor of finding hate speech as an appropriate exception to the "free speech principle" should be mentioned. The argument assumes both that there are in fact and that there should be many exceptions to the free-speech principle. Most of what these claimants assert as exceptions is considered such by absolutists, making their point irrelevant. No absolutist – not Justices Black or Douglas, nor Thomas

Versions of this chapter were presented at conferences on hate speech at the Cardozo Law School in New York City (November 2005) and the Central European University in Budapest (April 2006). I received helpful comments from many people but particularly Peter Molnar and Monroe Price. This chapter revises and extends "Autonomy and Hate Speech," in *Extreme Speech and Democracy* 139 (Ivan Hare & James Weinstein eds., Oxford University Press 2009).

[Editors' Note: Ed Baker died, unexpectedly and much too soon, before final revisions to this chapter were complete. We have made a few grammatical corrections and slight changes in the footnotes but otherwise left his text intact.]

should be protected – a theory that I believe provides the best, albeit often unrecognized, explanation of existing American case law but one that is surely a controversial, probably minority, view even in the United States. There are, of course, arguments that emphasize different evils about hate speech, evils presumably less dramatic but more common than those just mentioned, about the harms caused by hate speech. Although these will mostly not be discussed here, my expectation is that the arguments for and against prohibitions discussed here will, with variable force, also apply to those arguments – and I will occasionally note how a focus on these rationales could weaken or strengthen arguments against regulation.

Most readers will realize, as do I, that the abstract theoretical grounds offered here will not and should not satisfy my imagined proponent of regulation. Thus, Section III describes the empirical evidence that would cause me to abandon the theory described in Section II, at least in the context of some category of racist or hate speech, but then gives reasons to doubt that this evidence will be forthcoming. In the end, this essay could be seen as a call for more knowledge – I stand ready to be shown that relevant evidence overrides my doubts about the wisdom and efficacy of suppression.

Given the inevitable uncertainties about empirical evidence, Section III does not answer the last sentence of the imagined argument for regulation set forth earlier about the mere *possibility* of making a contribution toward prevention. Thus, Section IV offers a different answer: it considers reasons to expect, as a practical matter, that hate speech regulation is more likely to contribute to genocidal events and lesser forms of racial violence than to reduce them. Historical horrors help justify – or so I suggest – greater, not lesser, protection for speech. My hypothesis is that a concern with racism and racial violence empirically supports a gamble on strong speech protection. Section V is a brief conclusion.

I

Before beginning, however, I offer the following preface. Constantly, references to "American exceptionalism" are made in discussions of free speech. Usually the suggestion is that the United States is extremely protective of free speech, disregarding most contrary values, whereas Europeans and others, although generally protective of core speech freedoms, allow restrictions that are "prescribed by law and are necessary in a democratic society."[2] Although if the view I present were accepted, no laws invalid under the First Amendment in the United States could meet this "necessity" standard, Europeans interpret it with a "margin of appreciation" that allows restraints. Under this standard, they recognize other important values in determining the extent of protection of speech – basically an approach Americans call "balancing." Nevertheless, this suggestion of difference is, at best, overblown. First, in many contexts, many Europeans favor – including some justices in the European Court of Justice – something close to what has been portrayed as the strongly speech-protective American position. For example, a 2004 decision of the Hungarian Constitutional Court followed its earlier 1992 decision in repeatedly invoking the American "clear and present danger" test in finding unconstitutional a law that punished speech provoking racial hate.[3] In contrast to these European defenders of strong speech protection, many, if not most, American First Amendment scholars and jurists favor a "balancing" that is quite like what is portrayed as the European approach.[4]

There is also a historical point. Though some Americans – I am one – favor the strongly speech-protective approach identified with American exceptionalism, that approach has been in the United States a "fighting faith" that often has not (yet) prevailed. Admittedly, the last half of the twentieth century saw generally increasing protection of speech in America. Still, especially early in the twentieth century and before, American courts regularly approved limits, jailing or fining people for their speech activities. All sorts of expression have been prohibited and punished – speech favoring socialism, communism, anarchism,[5] and an even more mainstream political editorial;[6] racist speech[7] or sexually explicit

Emerson, nor any other major absolutist scholar – ever suggests that all of (or only) something describable as verbal speech should be exempt from legal regulation. Rather, all have a theory of what a proper free speech principle covers and then argue that (at least) government abridgments or violations of that principle are impermissible. This approach is evident in the argumentative structure of judicial opinions – illustrated by many of the most famous First Amendment decisions of the U.S. Supreme Court – that consider whether the speech at issue is covered by the idea of free speech. If it is not, the absolutist favors upholding the regulation, if it is, the absolutist would strike down any regulation that abridges the freedom without even considering (sometimes without noting) as possible justifications the important state reasons for regulating. *See* C. Edwin Baker, "Harm, Liberty, and Free Speech," 70 *S. Cal. L. Rev.* 979 (1997). Thus, the absolutist would entertain – and what I explain later in the chapter is why I would reject – the argument that hate speech is not covered by the rationale for free speech. Nevertheless, to the extent that she maintains her absolutist position, she would not accept arguments about interests that purported to justify an exception.

[2] *See, e.g.*, European Convention on Human Rights §10(2). The Canadian Charter of Rights and Freedoms protects freedom of expression "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights & Freedoms, § 1.

[3] Hungarian Constitutional Court, Decision 18/2004 (v.25) AB, *available at* http://www.mkab.hu/admin/data/file/675-18_2004.pdf; *see* Peter Molnar, "Towards Improved Law and Policy on 'Hate Speech' – The 'Clear and Present Danger' Test in Hungary," in *Extreme Speech and Democracy* 237 (Ivan Hare & James Weinstein eds., Oxford University Press 2009).

[4] Virtually all First Amendment opinions of Chief Justice Burger or Justice Powell adopt a form of balancing. This approach, which received one of its best defenses in Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* (Harvard University Press 1990), would probably require reversal of many of the great modern First Amendment decisions in which no hint of balancing occurs. *See* Baker, *supra* note 1.

[5] *See* Zachariah Chafee, Jr., *Free Speech in the United States* 36–107 (Harvard University Press 1964) (describing cases).

[6] An editorial cartoon criticizing political corruption was the basis for a fine, with the court refusing to hear the publisher's offer to prove its truth. Patterson v. Colorado, 205 U.S. 454 (1907).

[7] Beauharnais v. Illinois, 343 U.S. 250 (1952).

speech;[8] publication and sale of great novels,[9] feminist materials important for sex education;[10] labor picketing[11] and public assemblies.[12] To this day, the First Amendment, which applies only to governmental, not private, activity, offers people no protection from being fired by private employers for their speech or political associations.

Interestingly, putting aside official legal doctrine, some political scientists have concluded that in practice, as opposed to rhetoric, the United States is not exceptional in the way typically suggested. The impression of one commentator is that as "compared to nine European democracies, the U.S. has imposed the most severe legal and social 'obstacles to political dissent.'"[13] Later this chapter will raise general doubts about causal claims. Still, I cannot help wondering if the extraordinarily sad state not only of American foreign policy but also of domestic policies, which have left the United States with greater income inequality than any other industrialized democratic country, reflects in part the historically *inadequate* protection of speech freedom in the United States. How would our politics have gone if we had not suppressed labor activists from early in our history, the liberal internationalists during or after World War I, or wiped progressive thinkers out of the universities and cultural industries during the McCarthy period, a cleansing that took decades to repair? Much of Zachariah Chafee's classic book on free speech can be read as supporting his speculative comment that greater respect for free speech at the time of World War I might have led to a better treaty after the war, to support in the United States for the League of Nations, and to "sav[ing] English children from German bombs in 1941."[14] In any event, even though many of the most prominent advocates of rather

[8] Roth v United States, 354 U S 476 (1957).
Courts upheld, for example, bans on Theodore Dreiser, *American Tragedy* in 1930, Lillian Smith, *Strange Fruit* in 1945, Edmund Wilson, *Memories of Hecate County* in 1947, Erskine Caldwell, *God's Little Acre* in 1950 *See* Thomas I Emerson, *The System of Freedom of Expression* 468–70 (Random House 1970) Beyond the judicial approval of censorship of specific books was, of course, the effect of this potential on what was written and deleted. This censorship of great – as well as not so great – literature in the United States is well and exhaustively described in Edward deGrazia, *Girls Lean Back Everywhere The Law of Obscenity and the Assault on Genius* (Random House 1992).

[9] Most famous is Margaret Sanger's prosecution under the Comstock law for trying to circulate birth control information. Margaret A. Blanchard, "The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize," 33 *Wm & Mary L. Rev* 741, 766–78 (1992).

[10] Gaboney v. Empire Storage Co, 336 U.S 490 (1949), Hughes v. Superior Court, 339 U.S 460 (1950), International Brotherhood of Teamsters v. Vogt, 354 U S 284 (1957).

[11] A conviction for public speaking in a public place was famously affirmed by Justice Holmes in the now discredited decision of Commonwealth v Davis, 162 Mass. 510 (1895), *aff'd*, 167 U.S 43 (1897), and later echoed in decisions such as Cox v Louisiana, 379 U.S 559 (1965) (upholding ordinance that prohibited picketing near a courthouse, although reversing conviction because of selective application of statute against defendants) and Adderley v Florida, 385 U S 39 (1966) (upholding conviction for peacefully demonstrating outside a county jail).

[12] Robert J. Goldstein, *Political Repression in Modern America. From 1870 to the Present*, xiv (Schenkman Publishing 1978) (quoting Robert Dahl, *Political Oppositions in Western Democracies* xvi, 390–2 [Yale University Press 1968])

[13] Chafee, *supra* note 5, at xiii, 561–2.

absolutist speech freedom may be American scholars and jurists, identifying that position with an American and contrasted with a European reality is exaggerated. Still, relatively absolutist protection is the view that my comments endorse.

Finally, I might note that the argument of the three parts of this chapter respond to only some, albeit I believe the most common and most powerful, arguments supporting legal prohibitions on hate speech, and some of the considerations developed here apply somewhat more broadly. Other arguments for prohibitions are mostly outside the chapter's scope. Still, I will briefly comment on one somewhat startling argument made by Jeremy Waldron [15] He claims that he can "test" the liberal belief that a free society (of which he says a Rawlsian well-ordered society is a subcategory) would not have laws against hate speech He performs the test by asking "what does a *well-ordered society* look like?" Noting that a society that "permits [racial hate] publications may *look* quite different from a society" in which these are not legally permitted, he concludes that a well-ordered society would look like the second. From this, he appears to offer a non sequitur: laws prohibiting racist publications would be appropriate in a free society. He also takes the Rawlsian claim that in a well ordered society, "everyone accepts, and knows that everyone else accepts, the very same principles of justice," and that people "assure each other of . . . their joint allegiance" to these principles, an assurance that "dignity requires," as a central premise for his conclusion that such prohibitions are proper. To achieve this required assurance of each by the other, Waldron argues, laws can make a contribution – they can provide "public guarantees." Put only somewhat differently, in a Rawlsian well-ordered society, "citizens have and can rely on public assurance of one another's commitments to justice," which includes the dignity that is Waldron's concern.[16] He claims that "a well-ordered society is supposed to provide [these assurances]" and that this assurance is provided in part by the government, presumably this being a justification for laws prohibiting at least some hate speech.[17]

Consider three points about this argument. First, most importantly, it seems that Waldron's proposal *eliminates all possibility* of achieving his goal *of a well-ordered society*. A person's general behavior and speech *cannot* be taken to give the necessary

[15] Jeremy Waldron, "Dignity and Defamation The Visibility of Hate," 123 *Harv. L. Rev* 1596 (2010).

[16] Dignity is subject to quite diverse understandings. For Waldron following views particularly common in Europe – among other things, a person's dignity involves the legal right to control other people's thoughts and attitudes or at least some of their expressions of their thoughts, attitudes, and beliefs Rather than viewing dignity as dependent on control of (ownership of) other people's minds and expression, other views find this conception directly contradicts human dignity. The idea of dignity implicit in this chapter encompasses a person's status as an agent who has a right and, to some extent, an ability to have and express attitudes and beliefs Even though much is left to be said, the first conception seems more natural and necessary for an inegalitarian status-based society, and the second for an action-based society in which people live self-authored lives or, at least, lives for which they claim ultimate responsibility. Illustrative of this difference is the original development of the law of defamation as a means to protect political and social elites from damage to their reputational status by false, or even worse, true reports of their foibles.

[17] Waldron, *supra* note 15, at 1617–35.

assurance of – indeed to give *any* assurance of – one's recognition of another's dignity or equality if one is not free to assert the contrary. If, as Waldron, echoing Rawls, suggests, a well-ordered society depends on people *knowing* what other people believe, it cannot be such a society unless people are free to say what they believe. True, a just order may rely on laws against murder to provide public assurance that murder is not tolerated, but this is because law *can* properly deal with individual behavior – but cannot determine, and certainly cannot guarantee knowledge of, what people think. Any chance of knowing what another person thinks depends on her freedom to express her commitments or other attitudes.

Second, creating a society that *looks* well-ordered does not show that it *is* a free society (a category that includes well-ordered as an idealized subcategory). To really be a free well-ordered society, the society must not only look well-ordered but must meet the prerequisites of being free and well-ordered – requirements that include, first, freedom and more specifically, the capacity of people to assure each other of their mutual commitments. A "well-ordered" Potemkin village is probably the best example of Waldron's "political aesthetics" but it guarantees nothing about what the society *is* like other than, if coercive laws were necessary to create the appearance, that the society is not free.

Third, there is a question of how a society becomes well ordered. Waldron is surely right that "societies do not become well-ordered by magic" and even right that the state and the law have an important "expressive role" – the law should not communicate people's lack of equality or dignity, which was a major evil of segregation and other laws that violate the Fourteenth Amendment's equal protection clause.[18] As the U.S. Supreme Court said in rejecting compulsory flag salutes by children in school, "the end" – there "national unity," here each person's respect for and assurance of each other person's respect for people's dignity and equal status as citizens – as something that "officials may foster by persuasion and example[,] is not in question."[19] What is in question is whether Waldron is persuasive that "the disciplinary role of the law" – presumably including prohibitions on hate speech – may be "necessary," as he says it is "natural to think" – or, as the Court asks, "whether . . . compulsion . . . is a permissible means. . . ."[20] In saying that the government cannot coerce speech, the Court opined that it was not "choos[ing] weak government over strong government," but rather "adher[ing] as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end."[21] In asking whether the "slow and easily neglected route to aroused loyalties," which corresponds to means

[18] Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 *Duke L.J.* 431 (1990), C. Edwin Baker, "Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection," 131 *U. Pa. L. Rev.* 933 (1983).

[19] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 640 (1943).

[20] *Id.*

[21] *Id.* at 637.

Waldron characterizes as "spectacularly dumb" if relied on in neglect of coercive laws, "may be short cut by substituting [compulsion]," the Court answered so."[22] According to the Court, "to believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."[23] The same can reasonably be said about the appeal of attitudes necessary to sustain a really just or well-ordered society or the people for whom having these attitudes is important.

II

My premises are (1) that the legitimacy of the legal order depends on it respecting people's equality and autonomy; and (2) that as a purely formal matter, the legal order only respects people's autonomy if it allows people in their speech to express their own values – no matter what these values are and irrespective of how this expressive content harms or leads to harms of other people or makes government processes or achieving governmental aims difficult. Pursuit of substantive aims, such as helping people experience fulfillment and dignity, must occur within a legal structure that as a formal matter respects people's equality and autonomy.

The conception of autonomy that the state must respect is, as noted, in a sense *formal*, not *substantive*.[24] A legal order must generally ascribe autonomy to people, usually withdrawing this attribution only to certain behavior within and purportedly controlled by institutional structures frameworks steered by mechanisms other than communication and a person's choices or on basis of individualized assessments of lack of competence. The state cannot coherently *ask* a person to obey its laws unless it treats the person as capable of making choices for herself, for example, the choice to obey the law.[25] As so conceived, respect for a person's autonomy is in general an on/off value. A government regulation either is or is not consistent with the required respect. A person is not treated as formally autonomous if the law denies her the right to use her own expression to embody her views. As used here, formal autonomy applies to individual activity or choice, not claims to control others or achieve particular results. (I have gone further and argued that an individual also must have a general right over the value-expressive uses of oneself – one's own body – but that raises interpretive difficulties not necessary to examine here.) Moreover, meeting the requirement of respecting her choice autonomy, granting this expressive right,

[22] *Id.* at 631.

[23] *Id.* at 641.

[24] C. Edwin Baker, "Autonomy and Informational Privacy or Gossip: The Central Meaning of the First Amendment," 21 *Soc. Phil. & Pol'y* 215 (2004).

[25] Seeing the law this way represents the most important transformative element of H.L.A. Hart's transformation of positivism. See H.L.A. Hart, *The Concept of Law* (2d ed., Clarendon Press 1994) (1961). C. Edwin Baker, *Hart's Transformation of Positivism* (2008) (unpublished manuscript).

creates no actual or even potential conflict with respect for others' formal autonomy, that is, no conflict with recognizing their equivalent choice or expressive rights with respect to their body or speech. Law's respect for formal autonomy of one person never denies respect for the formal autonomy (or, for that matter, the formal equality) of another. This lack of conflict is possible precisely because formal autonomy does not involve claims to achieving or even capacity to achieve any particular results, claims that would create potential for conflicts between different claimants.

In contrast to respect for a person's formal autonomy as an absolute requirement of legal legitimacy, a central aim of a democratic state should be to promote people's *substantive autonomy*. Substantive autonomy involves a person's actual capacity and opportunities to lead the best, most meaningful, self-directed life possible. Laws that advance one person's substantive autonomy – by allocating resources to her or providing her information, for example – often reduce the substantive autonomy of another person. In making policy choices, a state is properly influenced by potentially conflicting substantively egalitarian aims, welfare-maximizing considerations, and various inevitably non-neutral collective self-definitional or majoritarian values. These policy or legal *choices*, as compared to others the state might make, inevitably favor some people's substantive autonomy over that of others.

Democratic legitimacy, I believe, and certainly the civil libertarian commitment, requires that, in advancing people's substantive autonomy as well as in advancing substantive egalitarian aims and other proper policy goals, the legal order neither have the purpose to nor use general means that disrespect people's formal autonomy (or their formal equality). On this view, respect for free speech is a proper constraint on the choice of collective or legal means to advance legitimate policy goals. Typically racist hate speech embodies the speaker's at least momentary view of the world and, to that extent, expresses her values. Of course, her speech does not respect others' equality or dignity. It is not, however, the speaker but the state's legitimacy that is at stake in evaluating the content of the legal order. Law's purposeful restrictions on such racist or hate speech violate the speaker's formal autonomy, whereas her hate speech does not interfere with or contradict anyone else's formal autonomy even if such speech does cause injuries that sometimes include undermining others' substantive autonomy. For this reason, prohibitions on racist or hate speech should generally be impermissible – even if arguably permissible in special, usually institutionally bound, limited contexts where the speaker has no claimed right to act autonomously – such as when, as an employee, one has given up one's autonomy to meet role demands inconsistent with expressions of racism.

Admittedly, other influential theories of free speech could lead to different conclusions – or different explanations for similar conclusions. Pragmatic balancers are likely to treat the notion of formal autonomy as incoherent or lacking moral appeal and instead seek to advance people's substantive autonomy, possibly in a roughly egalitarian manner, or to advance other substantive goals. Undoubtedly, the mere expression of racist hate speech can cause real injuries and has the potential

to stimulate further harms. As will be noted later in the chapter, however, those disparaged by hate speech might well be better off without legal restrictions on the speech. Without offering any sympathy for the racists, the pragmatic balancer could plausibly come out on either side in this debate about legal restrictions on hate speech.[26]

Equally interesting is a more foundational approach to free speech. Some view free speech guarantees as a necessary implication of democracy – with the scope of protection limited by its rationale.[27] To many thoughtful observers, this democratic basis for the protected legal status of speech suggests justifiable restrictions on at least some racist hate speech. The assertion is that racist speech contradicts the democratic premise – an equality in being self-governing – that justifies protection of speech. For example, hate speech that portrays a particular group as unfit to participate in the governing process or that advocates crimes against members of a particular group rejects basic premises of democracy. The critique observes that the hate speech does not take a position *within* democratic discourse but rather aims at thwarting democracy and democracy's discourses by means of actual or expressive exclusion. For this reason, it is argued, hate speech can be prohibited.

In the past, a number of jurists have accepted roughly that view – arguing that antidemocratic speech is permissibly prohibited. Judge Learned Hand treated counseling or advocacy of law violation as inconsistent with the democratic methods of change and, therefore, properly made illegal.[28] Justice Felix Frankfurter explained that communists' speech ranked low on any scale of values.[29] Presumably the low ranking occurred because the communists recommended change by nondemocratic means; for that reason, their speech was not "political" within Frankfurter's understanding of democratic practice. Robert Bork likewise denied that advocacy of law violation – for example, advocacy of revolution or even peaceful civil disobedience – could be "political speech," which is the only category that he would protect.[30] At mid-century, Carl Auerbach argued that the basic postulate behind the First Amendment allows Congress to "exclude from the struggle," to restrict the speech of "those groups which, if victorious, would crush democracy and impose totalitarianism."[31] Such arguments could apply equally to racist hate speech, at least to the extent the speech rejects the premise of democratic inclusion.

[26] Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* 49–87 (Princeton University Press 1999).

[27] Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper 1960).

[28] *See* Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).

[29] *See* Dennis v. United States, 341 U.S. 494 (1951) (Frankfurter, J., concurring).

[30] Robert Bork, "Neutral Principles and Some First Amendment Problems," 47 *Indiana L.J.* 1, 20, 29–31 (1971). At about the time of publication, in a lecture given at Yale Law School, Bork argued, as I remember it, for an even more restrictive understanding of the scope of political speech.

[31] Carl A. Auerbach, "The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech," 23 *U. Chi. L. Rev.* 173, 189 (1956).

Others argue, however, that this conclusion does not follow, at least does not follow for "our" (meaning the American) particular version of democracy.[32] They claim that all speech, no matter how disrespectful of others, that is part of public discourse merits protection, possibly absolute protection. Emphatic about locating the basis of free speech in "our" conception of democracy, which is premised on people's autonomously arriving at their own political views – that is, arriving at their views without legal restriction on the public discourse leading to those views. A person must be able to explore (advocate or hear) even views inconsistent with democracy to formulate her own commitments – although this strong protection of speech applies only to speech that is part of public discourse, which arguably covers only speech evocative of possible public issues and which is part of a possible public sphere or public discourse.

This view has undeniable strengths both interpretatively and normatively and may very well reach the same conclusion about most regulation of hate speech as does my emphasis on formal autonomy. Still, unlike a theory grounded on respect for individual autonomy, this democratic approach does not cover protection of speech not properly characterized as part of public discourse. (Interestingly, albeit for different reasons, both the autonomy and the democratic discourse approaches either completely or largely deny protection to "commercial speech."[33]) My theoretical objection to this view relates to its initial premise – that we should protect speech fundamentally because the protection is essential to democracy or, more precisely, to the conception of democracy that we accept. My question is *why* are we so concerned with democracy? Why does democracy provide a foundational premise? The strategy of my question is the expectation that any sound normative answer to this inquiry, outlined in the last paragraph of this section, will both explain the proper contours of democracy and show that an explanation of the *nature and significance* of democracy's contribution to the legitimacy of the legal order requires and reflects acceptance of value premises that go beyond the structure of the political order to matters such as protection of even nonpolitical self-expression.

One response could attempt to avoid the normative question and merely say – perhaps for the United States but maybe not those European countries that restrict hate speech – that we are not only in fact deeply committed to democracy, but also that *our* conception of democracy requires virtually complete citizen autonomy within public discourse. This essentially sociological response, however, leaves two problems. First, it does not answer the skeptic, the person who wonders why we

[32] Robert C Post, *Constitutional Domains* 119–78 (Harvard University Press 1995); Robert C Post, "Hate Speech," in *Extreme Speech and Democracy*, *supra* note 3, at 123; James Weinstein, "Hate Speech, Viewpoint Neutrality, and the American Concept of Democracy," in *Boundaries of Free Expression & Order in American Democracy* 146–69 (Thomas R. Hensley ed., Kent State University Press 2001); James Weinstein, "Extreme Speech, Public Order, and Democracy: Lessons from *The Masses*," in *Extreme Speech and Democracy*, *supra* note 3, at 23.

[33] *See, e.g.*, C. Edwin Baker, "Commercial Speech," 84 *Indiana L.J.* 981 (2009).

should be committed to democracy or, if we should be, why to *our* particular conception of democracy, especially given, as Meiklejohn commented, "the sheer stupidity of the policies of this nation."[34] Second, even more fundamentally, to the extent that we do in fact adopt laws punishing hate speech – even if invalidated by courts – it seems that *our* conception of democracy is at least contested. It even seems that, in the view of the majority, our conception of democracy is more like the one that Justice Frankfurter and Judge Hand describe than the one Professors Post and Weinstein propose. They may be right but they need a normative, not merely sociological, rationale for their position.

Instead of the contextual sociological claim, I have argued that the best answer to this normative question of what it is about democracy that justifies our allegiance is that democracy is the *only* political order that embodies a normative principle of *equal* respect for people's right to be engaged in *self-determination* when self-determination occurs at the group level, leads to legal allocation of resources, and involves coercion – that is, is the only form of government that respects people as free and equal in the process of choosing laws. But if legitimacy (or the justification of legal obligation) requires respect for people's right of self-determination, there is no reason why this required respect applies only when people act to decide about the collective but not when they act to decide about themselves. If this is right, the fundamental status of each person's equality and autonomy provides *both* the normative basis for democracy and a set of normative principles that democratic laws must not violate. These values both require democracy and require limits on democracy. The logic of this rationale for democracy does not so much place free speech at the center of democracy as locates democracy as an offshoot of respect for individual autonomy (and equality) that encompasses free speech. Respect for ascribed autonomy is both definitive of, and restricts the scope of, both foundational free speech and democracy. Thus, I reject an emphasis on democratic foundations for free speech in favor of this more basic premise of respect for individual autonomy to which the law must conform even as it pursues practices that favor people's substantive autonomy. On this basis, the legal order must respect the autonomy even of the individual who would deny such respect to others in the community – the law must respect the freedom of the racist to express her views.

III

Abstract theory is fine. But a convincing case that a different approach to free speech might prevent occurrences such as the Holocaust, more recent genocides like that in Rwanda, or other virulent, murderous racist practices would lead me – and I suppose any person of goodwill – to revise abstract commitments that counsel against legal

[34] Alexander Meiklejohn, "The First Amendment Is an Absolute," 1961 *Sup. Ct. Rev.* 245, 263.

prohibitions of racist speech. So the natural question is What evidence or argument would such a convincing case require?

First, historical evidence should be available. But then the question becomes What specific historical evidence should be tellingly relevant to us today? Germany's experience with Nazism is often noted in explaining their current prohibitions of hate speech, but it is less than clear that this history shows that these prohibitions are now needed. Historical accounts will likely find racist hate speech prominent in periods leading up to the genocide. But that finding is clearly not enough. It would not show whether this speech was causal or merely symptomatic, reflecting attitudes, prejudices, and underlying forces that would have led to violence without being crystallized in anything that would be covered by any plausible legal category of hate speech. The hate speech might have even been usefully symptomatic of exposing a serious problem with which society needed to deal. And the history would not show whether, even if causal of violence in that historical context, it would be so under different historical conditions for example, the conditions that exist in modern democracies.

Still, even in the absence of good empirical evidence, a causal claim about racist hate speech – at least as a contributing cause within a longer chain of causation – seems intuitively very plausible. Genocide or virulent racial discrimination presumably reflects attitudes. It is difficult to understand how such attitudes could first arise and then persist if not in some way embodied in people's communications, their expression. Of course, such expression is unlikely to arise out of nothing. Material conditions and social orientations that are not themselves equivalent to the expression of racism are also likely to be a central part of the causal chain. If so, the question becomes where in this causal chain, where in its fight against virulent racism, a legal order should target its intervention(s). Pragmatically, the question is where political interventions would actually be needed, effective, and politically feasible. The reality may be that the second and third (effective and politically feasible) and the first (needed) come apart in respect to hate speech regulation but not in respect to other possible responses. As to effectiveness, as noted earlier, the problem is that the causally significant racist speech may take a broader, ideological, more general attitude creating form than the narrower, more specific category that any plausible restriction of hate speech would cover. As to politically feasible, it may be that effective passage *and adequate enforcement* of hate speech restrictions would only occur when they are not needed. (Many countries that have experienced the worst racist violence have, in fact, had such prohibitions without successfully preventing racist or genocidal results [35])

[35] I was told at the conferences where this chapter was presented that both Rwanda and Germany are examples

The seriousness of the evil surely justifies multiple interventions if their multiplicity increases the likelihood of favorable outcomes. Still, pragmatically to justify hate speech regulation seems to require that the following be shown:

1. Hate speech occurs in cases of genocide or virulent racial discrimination a demonstration that usually – maybe always – can be made.
2. As a causal matter, hate speech – or, more specifically, the hate speech that would be outlawed by hate speech regulation – contributes to these evils The more general version of this claim is probably right, although the more specific claim about the specific hate speech that would be barred is considerably more speculative As noted, most proposed legal restrictions on hate speech target a relatively narrow category (even if to those caught up it, often members of racial minorities, an unduly broad category) that might be characterized as emotional epithets, while leaving calmer (or coded) expositions of racism untouched although the later may be the more causally significant. Evidence or careful argument on the point is seldom offered and, I suspect, any offering would seldom be fully convincing.

Even if these two points are right, a sound argument for legal prohibitions also requires persuasive grounds to believe the following additional claims:

3. Legal prohibitions of hate speech are actually an effective place (even if not the exclusive place) to intervene in the causal chain. I have seen little empirical evidence supporting this claim. Later in the chapter, I will suggest doubts that this argumentative burden can be met.
4. Enactment of the hate speech prohibitions creates greater benefits than costs. The latter may include costs, which some people might characterize as benefits, related to the extent or nature of democracy and to human freedom. Moreover, the benefits should be calculated in terms of the excess or benefits over those that could be achieved by more modest (and politically feasible) measures justified in terms of their having greater benefits than costs – a point very roughly embodied in standard First Amendment doctrine by the requirement that restrictions on speech be not only adequate but also "necessary" to serve a compelling state interest.
5. These legal bars on hate speech would not reduce the efficaciousness or likelihood of other (legal or social) interventions that would be more effective in preventing virulent racist acts; or, at least, that any negative effects would not be greater than any benefits the bars on hate speech provide.

An assessment of these five essentially empirical matters is crucial. I will put aside the fourth, assume the first two *arguendo*, and focus on the third and fifth.

The third point requires two doubtful claims. It must assume that political forces will be able to secure adoption and adoption of the needed prohibitions on hate

speech *in those situations* where the prohibitions are needed and that the prohibitions would be causally effective as a means to prevent virulent racism or genocide. Clearly, many places in the modern world have adopted such prohibitions. The possibility is real, however, that the prohibitions will be adopted and enforced *only* in places where not needed. Nevertheless, maybe the proper purpose of international conventions requiring their adoption is precisely to add to the political pressure to adopt such restrictions, thereby increasing the likelihood of their adoption where needed.

Even more problematic, to be an effective place to intervene, adopted prohibitions must be efficacious in reducing the likelihood of serious racist evils. Most obviously, this result probably requires sufficient enforcement of the prohibitions against the relevant targets. Nevertheless, maybe the argumentative burden can be met here too. Still, even mere adoption may help create a cultural climate where racist speech – and even more importantly, virulent racist practices – are unacceptable. As to sufficient enforcement, the question is made more difficult because it is not clear at what stage enforcement would be meaningful in preventing the polity from devolving in an unacceptably racist direction or whether enforcement could be effective at reversing cultural directions. Active enforcement (against appropriate targets) is likely only if racist groups have not become too established. By the time Nazis were gaining power, or during the year immediately preceding the genocide in Rwanda, effective enforcement was unlikely. At the relevant time, enforcement would likely either be blocked, create a backlash against the enforcers and sympathy for the "suppressed" racists, or – as will be discussed later – enforced primarily against "unpatriotic" or "racist" speech of those most needing protection – Jews or Tutsis, for example, or against African Americans in the United States or Algerians in France.

Thus, the hope of those favoring hate speech prohibitions must be that enforcement will be meaningful and effective at a quite early stage. Pessimism about this speculative hope seems justified. First are generic doubts about the likelihood of effective legal enforcement. More important, however, is the likelihood that at this most relevant stage, the speech that meaningfully contributes to developing or sustaining racism will be subtle, quotidian, and, to many people, seemingly inoffensive or at least not "seriously" offensive speech. This speech is likely to fly under the legal radar screen and, in any event, meaningful enforcement of prohibitions against this speech is even less likely. Thus, even given a belief that racist speech contributes significantly to virulent racism and genocidal practice, my hypothesis is that at earlier stages, legal prohibitions will not cover or be effectively enforced against the most relevant speech, and at later stages enforcement will not occur, will be counterproductive in creating martyrs for a racist cause, or will focus on the wrong targets.

Even if there is reason to doubt the effectiveness of legal prohibitions in preventing the reign of racist practices, the horrific evil feared (as well as the noxious quality of speech properly covered by a prohibition) recommend that error should be on

the side of caution. Here is where the fifth point about possible negative effects of restrictions on hate speech, preliminarily suggested by some previous comments, is crucial. Caution – it is awful speech, and any possibility of reducing the evils it may contribute to justifies restriction – is often given as a reason to prohibit hate speech. This reason, however, depends crucially on rejecting two further real empirical possibilities: (1) that the prohibitions themselves will contribute to the racist nature of society, and (2) that adoption of hate speech prohibitions will make other, more effective interventions against the development of a racist, genocidal culture or polity less likely or less effective. Of course, the opposite empirical results are possible. Advocacy of and then adoption of hate speech prohibitions and pressure for their enforcement could invigorate an antiracist politics that makes other, maybe even more significant interventions, more likely. And, if the first possibilities turn out to be true, adoption of hate speech prohibitions would contribute to the evil outcomes that a country must try to prevent. That is, official legal suppression of "evil" speech could generate the very evil that motivates suppression.

Given these alternative empirical possibilities, the debate is not between idealistic but uncaring "liberal" defenders of free speech and fierce opponents of the worst forms of racism. Rather the pragmatic debate is about different empirical predictions concerning the most effective strategy for opposing racism. Empirical evidence suggesting which scenario – or when – is most likely should be welcome. Perhaps the evidence exists, although I do not know of it at a level where confidence in a particular conclusion is warranted. Thus, Section III describes considerations supporting the judgment that speech prohibition will actually exacerbate racist practice. Finally, if the issue remains in doubt, I will consider which direction merits our gamble.

Before engaging in that discussion, however, I will note an invocation of the exacerbation hypothesis in a judicial opinion favoring free speech. In the late 1940s and early 1950s, the United States prosecuted leaders of the Communist Party for what could be benignly characterized as advocating (teaching), or conspiracy to teach, the necessity and propriety of violent means to achieve a proletarian dictatorship (although without any relevant evidence, some Justices gave the speech at issue a more malignant characterization). When their convictions were affirmed by the Supreme Court in *Dennis v. United States*, Justice Douglas in dissent powerfully asserted:

> Communism in the world scene is no bogeyman; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. *Free speech* has destroyed it as an effective political party.[36]

Essentially Douglas's account claims "exceptionalism" for the American response to communism. The claim is implicitly twofold: that the American response was to

[36] Dennis v. United States, 341 U.S. 494, 588 (1951) (emphasis added).

rely on free speech and that this response was more effective than other responses tried elsewhere in the world. Unfortunately, specifics of Douglas's historical account and causal claim are either doubtful or much too simplistic. Nevertheless, Douglas illustrates the logic of a view that favoring free speech provides a central aspect of the best response to a major evil to which objectionable speech is said to contribute. Crucially, nothing in Douglas's argument for allowing the expression of evil views counsels neutrality toward or even toleration of those objectionable revolutionary views. The same lack of toleration even more obviously applies to the expression of racial hatred Nothing about legally allowing the speech – either in the *Dennis* case or in the hate speech context - suggests that the views expressed do not present a serious threat to the existence of an acceptable world. Rather, the *pragmatic* claim is that to allow people the option to express their dreadful views is less dangerous than to attempt to outlaw this expression.

IV

Finally, consider reasons that hate speech prohibitions are likely to backfire. My hypothesis has two reciprocal prongs. First, as an empirical matter, my suspicion is that the prohibitions will not be effective at reducing the chances of horrendous results. Reasons for that suspicion have been discussed earlier. Second, also as an empirical matter, my suspicion is that prohibitions on hate speech will actually exacerbate problems, will increase the likelihood of horrendous results. I consider six interrelated points that suggest this hypothesis.

First, enacting and defending prohibitions on hate speech may divert energy from and dampen the sense of necessity of the more vital activity of responding expressively to and critiquing racist views. Prohibitions, to the extent that they take overt expression of racism out of public discourse, create a danger about which John Stuart Mill warned. Without people having the experience of responding to and opposing expressions of misguided views, truth is in danger of becoming sterile dogma, ineffective for good because people will have lost the ability to justify and explain the truth when challenged.[37] This point – the need for any noxious doctrine that exists within a community to be publicly expressed and then persuasively rejected – was probably the underlying lesson offered by Justice Douglas's account in *Dennis* of the discursive defeat of communism in the United States

Here is a place to repeat the point that, even if human rights, including the right of everyone to express their views no matter how horrifying, require rejecting legal prohibitions of hate speech, this *legal* toleration does not imply state neutrality or complacence toward the evil views. *State* neutrality or *social* toleration is the opposite of what society needs. In any free discussion - or in wide-open debate where speech may be "vehement, caustic, and sometimes unpleasantly sharp" in

[37] John Stuart Mill, *On Liberty*, chapter 2 (1859).

its attacks[38] – conversational partners (or political opponents) should be committed to each being able to express her view. But the response of the other can be: "no, your view is entirely unacceptable, it is wrong for the following reasons, and I will do everything within my (legal) power to prevent it from being realized." Despite conservative objections, people *should seek political correctness*, like all forms of correctness. Of course, ideal responses to the people whom a person believes is offering evil counsels is a subject too extensive to take up here, but I should note that I am hardly recommending retributivist responses or denial of rights. Still, to the extent they are able, people should reject, not socially or discursively tolerate, evil counsels and evil endeavors. Specifically, people should condemn the racist expression and react accordingly to the people who purvey it.

As an empirical hypothesis, I suggest that more active (and thus more effective) opposition to racist views is likely to come from the social practice of not tolerating racist expression than from laws making it illegal. People in positions of power or authority do and should lose their influence, and often even their position of authority, for public or exposed private racist expression. Society should be and apparently is prepared to maintain strong social norms rejecting racist viewpoints. I fear, however, that laws prohibiting racist expression would weaken, maybe even replace, such social practices. Legal prosecutions focus on the wrong issues – legal requirements, legal line drawing, the propriety of prosecution of this rather than other cases. In any minimally decent society that legally *permits* hate speech, such expression of hate reflexively creates, for those who object to racism, a platform to explain and justify their objections. This expressive activity may provide the greatest safeguard against racist cultures and polities. In contrast, legal repression creates a platform for racists to claim victimhood and to appeal to the many who value liberty to oppose the suppression of their freedom, shearing off the energy of a significant group from the chorus that condemns the racist views.

Second is a closely related point. By causing racism to (largely) go underground, speech prohibitions are likely to obscure the extent of the problem and the location or the human or social carriers of the problem, thereby reducing both the perceived necessity and the likely effectiveness of opposition to racism. My experience has been that among those people who are likely targets of hate speech but who still favor free speech, the reason most often given for favoring speech is the advantage of "knowing the enemy." Knowledge of the existence, views, and, importantly, the identity of those with racist attitudes increases the capacity of those potentially subject to racist harms to protect themselves and to make meaningful rhetorical, strategic, political, and legal responses.

Third, speech prohibitions can increase (or create) racist individuals' or groups' sense of oppression and thereby increase their rage and belief that they must act. Of course, the empirical issue could go either way. Prohibitions that push the more

[38] New York Times v Sullivan, 376 U S 254, 270 (1964).

virulent expressions of hate underground may reduce its salience, whereas allow[ing] it may increase the sense among its purveyors and their audience of the justificati[on] maybe the necessity and entitlement, of their acting even criminally against [the] targets. Thus, whether prohibitions on racist speech do more to prevent than [to] fan the development of racist attitudes is an empirical issue. I can only specula[te] here. Still I suggest that causes are deeper and prohibitions may do little If th[is] suggestion is right, the primary immediate effect of the speech prohibition m[ay] be simply to suppress (or to attempt to suppress) people's expression of their raci[st] views whereas the primary dynamic and longer-term consequence of suppressio[n] is to outrage and alienate those suppressed. Those suppressed may reasonably and rationally experience the majority (that is, those who back the law) and the legal order as specifically denying their basic rights, their right to express their truthfully held views in the public sphere (or in whatever contexts the specific law applies) while everyone else has this freedom. For this reason, they may conclude, they can no longer accord allegiance to (or view as legitimate) this legal order. That is, the prohibition is likely to increase the virulence of their views and their self-understanding of being treated unjustly by a legal order that they see as unequally coddling those whom they despise Under these conditions, those whose speech the prohibitions make illegal are likely to feel more increasingly justified in using any means – including violent or illegal means – to pursue their values. Essentially this is the point of Thomas Emerson's fourth, often neglected reason to protect free speech.[39] Speech freedom, he argues, helps create a balance between stability and change, which reduces the likelihood that pent-up anger, when almost inevitably it *eventually* expresses itself, will be expressed with irrational violence. The prediction is that even if speech prohibitions decrease the short-term level of expression of the forbidden views, they will increase the likelihood that those views will periodically be expressed by violent outbreaks rather than a social contestation in which any group numerous and strong enough to pass and enforce speech-repressive laws would surely prevail.

Fourth, prohibiting the *expression* of any values – even the most offensive views such as expression that denies democratic values or calls for violent or illegal actions – in the context of discourses where verbal responses are possible – is likely to reduce the democratic cultural self-understanding that conflicts are to be dealt as a political rather than violent struggle This self-understanding, as suggested earlier, helps decrease the likelihood (without eliminating the danger) that racism will be expressed in overt violence. This is basically Ralf Dahrendorf's vision that the idea of democracy is not to embody the naive goal to eliminate conflict but rather to move society's inevitable real conflicts from the plane of violence to the plane of politics.[40]

[39] Emerson, *supra* note 9, at 7. Thomas I Emerson, *Toward a General Theory of the First Amendment* 11–15 (Random House 1967)

[40] Ralf Dahrendorf, *Class and Class Conflict in Industrial Society* (Stanford University Press 1959).

Fifth, a political program of enacting and enforcing hate speech prohibitions runs the danger of diverting political energy from arguably more meaningful political responses to the underlying causes of racism. Three obvious and arguably more valuable places to put these energies can be noted – improving the material conditions of those who are the typical targets of hate, affirmative and public expressive condemnation of hate (the more speech solution), and changes the conditions that foster hate among some portions of society. As to this last, often purveyors of racism have themselves experienced forms of social or material discrimination (or deprivation) – and sometimes they even list their depressed material condition as evidence justifying disparaging racist views. Changing their material conditions is crucial to a long-term nonrepressive response to hate. Even though full consideration of the causes of racism is far beyond the scope of this chapter (and my understanding), social and material conditions, including those that generate feelings of economic and social marginalization, are likely contexts in which racial resentment flourishes. Changing these conditions, combined with creating contexts that can defuse racist attitudes, could make a significant difference in the likelihood of outbreaks of racial violence as well as in the ubiquity of racial hate. The prospects of successful suppression of hate speech may not be good, and may even exacerbate the problem, but the possibility of reducing (albeit probably not eliminating) underlying causes may be real. Political energy should be devoted to this task.

Anticensorship feminists made a similar point in debates about regulation of pornography. Although their substantive views about pornography varied greatly, the anticensorship feminists were united both in the view that the existing social order operated to oppress women in many spheres and that a strategy of trying to suppress pornography was a misdirection of their political energy.[41] Similarly, the more meaningful political responses to racism include fighting racism within public discourse, referred to in the first point earlier, but also efforts to change social conditions that generate the alienation of groups among which racism flourishes. Equally important are policy endeavors aimed at integrating into the culture and economy typical targets of racist oppression. Creation and effective enforcement of laws prohibiting discrimination in employment and education, as well as affirmative recruitment or subsidy of typical targets of racism, could help change the material conditions that create racial oppression The goal should be to change the material conditions that reflect, breed, and sustain racial hatred.

As an example of wrongly directed energies, I once observed corporate leaders showing their liberality by favoring suppression of hate speech (which, in any event, is not conducive to a good business climate). They thereby seemed to be (as I expect they are) caring people who, as individuals, oppose racism. These same

Carlin Meyer, "Sex, Sin, and Women's Liberation Against Porn Suppression," 72 *Texas L. Rev* 1097 (1994), Nadine Strossen, "A Feminist Critique of 'the' Feminist Critique of Pornography," 79 *Virginia L. Rev.* 1099 (1993)

leaders, however, often oppose legal civil rights provisions that would force the firms to take responsibility for a lack of minorities in their workforce or discrimination against minorities on the job. It is hard to avoid the cynical view that this politi favors the superficial, and, for these businesses, the inexpensive remedy over re material responses to underlying social conditions that contribute to racism and racial subordination.[42]

Finally, a prohibition on even a narrowly formulated category of hate speech embodies a principle that will be hard to circumscribe. There are two problem here. First, these laws are likely to be abused by those in power, who will often b able to characterize the speech or politics of their opponents as amounting to ha speech or its equivalent. Consider possible characterizations: that labor agitato ferment class hatred and, potentially, class violence; lesbians ferment hatred of an violence against men; black nationalists make racist attacks on whites; Algerian insult the French. Today I suspect that mainstream majorities, with prosecuto ready to do their part, see the main purveyors of hate to be the many radica Muslims who, if not terrorists themselves, seem to be nurturing the hate that leads t terrorism. Majoritarian prejudices have an almost inescapable capacity to seem, t these majorities, as simply a description of reality and their expression not dangerous. Thus, it is much more likely that "vile" radical mullahs will be prosecuted than tha those who hold this view of Muslims will be. Nadine Strossen has argued that the typical use of laws prohibiting hate speech or related offenses against honor even if adopted to protect minority groups, are most often used to defend dominant groups and punish minority group members or suppress their speech.[43] Minorities in Ethiopia have been punished under hate speech laws for their criticisms of Ethiopia' dominant ethnic group.[44] In Rwanda today, the dominant regime appears to find criminal expressions of genocidal ideology everywhere, even among its moderat democratic adversaries and former and would-be supporters.[45] That is, hate speech prohibitions have been continually used to punish activists among oppressed groups for the criticism of dominant groups.

The second problem involves the slippery slope both in application of these categories and use of the justification. Any principle that allows restrictions on speec that preaches hate will be hard to contain. Suppression of other "harmful" speech b

[42] See a similar suggestion in James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* 155–6 (Westview Press 1999).

[43] Nadine Strossen, "Hate Speech and Pornography: Do We Have to Choose Between Freedom o Speech and Equality?" 46 *Case W. Res. L. Rev.* 449, 465–70 (1996).

[44] Yared Legesse Mengistu, "Shielding Marginalized Groups from Verbal Assaults Without Abus n Hate Speech Laws," Chapter 19 herein. Similar reports of the use of hate speech laws to suppre democratic opposition to the regime in power were offered by speakers at a panel, of which I was th moderator, entitled "Freedom of Speech and the Legislation of Memory," at *Healing the Wounds: Speech, Identity, and Reconciliation in Rwanda*, Cardozo School of Law (Mar. 30, 2009) (panel Jacqueline Bakamurera, Susan Benesch, Peter Molnar, and Lars Waldorf).

deal with other nasty problems will seem similar. Virtually all laws aiming to restrict speech can use as a justification that the law responds to real harms. However, most laws restricting speech see application only or primarily against marginal individuals and groups – the outsiders or dissenters who should be the primary beneficiaries of speech protection.[46] A real danger to free speech is that prohibitions on hate speech, justified because of the serious harm the expression can cause, are likely to justify other restrictions on the basis of arguments about other purported harms with the net effect of further subordinating the disempowered.

Even without any certainty that the prohibitions will have meaningfully beneficial effects, caution might at first seem to justify prohibitions of hate speech. If, however, the six points listed here are right, that is precisely the wrong conclusion. Instead, if these points are right, caution would accept the necessity of some real harm out of a realistic fear that prohibitions would overall be counterproductive and lead to even worse results. Those six reasons were: (1) allowing and then combating hate speech discursively is the only real way to keep alive the understanding of the evil of racial hatred, (2) forcing hate speech underground obscures the extent and location of the problem to which society must respond; (3) suppression of hate speech is likely to increase racists' sense of oppression and their willingness to express their views violently; (4) suppression is likely to reduce the societal self-understanding that democracy means not eliminating conflict through suppression – what Justice Jackson described as the unanimity of the graveyard[47] – but rather moving conflict from the plane of violence to the plane of politics; (5) legal prohibition and enforcement of laws against hate speech are likely to divert political energies away from more effective and meaningful responses, especially those directed at changing material conditions in which racism festers, material conditions of both the purveyors and targets of hate; and (6) the principle justifying prohibitions and the specific laws prohibiting hate speech are likely to be abused, creating a slippery slope to results contrary to the needs of victims of racial hatred (including jailing the subjects of racial hatred for their verbal responses) and to the needs of other marginalized groups.

Thus, my fear is the precedent of punishing racial hate speech, even punishing loosely defined genocidal speech, may itself contribute to tragedy. For example, as I understand the facts, the International Tribunal's conviction of Rwandan radio broadcasters for genocide based on their speech, speech which was integrated into the actual practice of murder much like that of the leader of a pack of gunmen who directs subordinates as to whom to shoot, was proper and would have been proper under the relevant U.S. free-speech doctrine relating to intentional creation of a clear and present danger of crime.[48] The First Amendment does not protect a person in using speech in an attempt to commit a crime.[49] The speaker who gives

[46] Shiffrin, *supra* note 26, at 121–30.

[47] *Barnette*, 319 U.S. at 641.

[48] *Brandenburg v. Ohio*, 395 U.S. [illegible]

orders to her associated gunmen is properly treated as having participated in any murder they commit. However, conviction for genocide of the Rwandan newspaper publisher, Hassan Ngeze, who periodically published racist diatribes against the Hutus' traditional oppressors and purported to speak in defense of his historically subordinated group, under circumstances where they were under armed attack by those oppressors,[50] and who published his views substantially before the occurrence of the genocidal murders, sets a troubling precedent.[51]

As I see it, if cycles of oppression and societal violence are to be broken, a society desperately needs to create a culture of open expression where all views, especially the most extreme views, are openly expressed and debated In contrast, legal prohibitions on racist speech to the extent that they would (often did) exist where "needed" but given how much and against whom these laws most likely would be (or were) enforced – would not have, or perhaps rather might not have, prevented the occurrence of the genocide in Rwanda or elsewhere. But the mere existence of the International Tribunal's precedent of jailing this publisher is likely to be used – I have been told informally, has been used – by those in power in African countries at a similar stage in the development of civil society and of democracy to suppress expression of opposition groups The precedent might even be used (or, more accurately, "abused") to justify punishment of "disrespectful" or "inaccurate" speech about those in power. The impact of this precedent on a nation, through its impact on press freedom, can be hugely significant. Any consequent lack of free press will contribute greatly to the likelihood of corruption in existing governments and to making any replacements of ruling elites much more likely to come only through violence. If my fears are right, the International Tribunal could have hardly given Africa a worse present.

My main pragmatic point, I suppose, is to doubt the validity of the hypothesis that a legal prohibition of (necessarily only some) racist speech, speech that admittedly occurs in contexts that produce genocidal results, would contribute to preventing such events. More specifically, the empirical suppositions justifying this opposition to hate speech regulation are:

1. Speech prohibitions will be ineffective. Contexts in which genocide practices occur are ones in which enforcement of hate speech prohibitions will not occur, and the development of such contexts will not be effectively prevented by earlier attempts to legally suppress hate speech. Too many bigoted practices and expressions will fly below the radar screen of any speech prohibitions.

[50] The complicated and frequently deadly political background of the Rwanda genocide is often ignored in popular accounts, but some of the groundwork was laid by the 1959 revolution, the transfer of power from the traditional minority Tutsi elite to a Hutu elite, the subsequent racialized contestations, and then, most importantly, the invasion by the basically Tutsi Rwanda Patriotic Front (RPF) continuing from 1990. *See* Mahmood Mamdani, *When Victims Become Killers* (Princeton University Press 2001).

[51] *See* Prosecutor v. Nahimana, Yagwiza, and Ngeze, No. ICTR-99-52-T (Dec. 3, 2003); C. Edwin Baker, "Genocide, Press Freedom, and the Case of Hassan Ngeze," U Penn Law School, Public Law Working Paper No 46 (2003), *available at* http //ssrn.com/abstract=480762.

2. Regulation of hate speech may affirmatively contribute to the rise of racist genocidal cultures or polities
3. A key, albeit hardly the only, element in the most effective strategy of preventing the rise of such a culture or polity is to provide for more robust protection of speech.

V

As a concluding comment, I want to indicate awareness of the fact that hate speech causes many real harms, many real injuries. Although I reject such a conclusion, these injuries could plausibly justify suppression of hate speech even if suppression were not a wise way to respond the most dramatic evils of racism. For two reasons, this chapter does not address arguments for suppression of hate speech based on these other injuries. First, much of the commentary explaining America's purported exceptionalism, its (purportedly) greater protection of speech, especially of hate speech, involves Europe's twentieth-century close-up experience with fascism and the Holocaust. I wanted therefore in this chapter to rebut the suggestion that some countries have reasons to restrict hate speech different from the reasons operable in the United States. Thus, I needed to argue that this historical experience does not justify, whether or not it explains, a purportedly different European evaluation of free speech. In this regard, I might note that the single most defining element of the American experience, continually reflected in countless aspects of American law, especially in our policy failures, is the legacy of African-American slavery and the American Civil War. Europe hardly has a monopoly on hate, on hate speech, or on racism.

Second, even though the arguments that racist speech causes real harms is surely right, that point is hardly unique to racist speech. Real harm is caused by most speech that judges or legislatures consider as possible bases for legal liability or punishment.[52] Here is not the place to discuss the point, but one or both of the reasons given here to protect speech – either normative views that protection is necessary to justify the legitimacy of the legal order or pragmatic arguments about bad consequences of accepting the propriety of regulation – justify a speech-protective stance despite the harm speech can and does cause. This is especially true given the inevitable errors of identifying what speech causes greater harm than benefits and given the inevitable chilling effect of speech regulation on valuable speech.

Justice Holmes argued that our theory of free speech "is an experiment, as all life is an experiment." It is a "wager . . . based on imperfect knowledge "[53] Given lack of

[52] *See* Baker, *supra* note 1, at 979 82, 986–8

[53] Abrams v United States, 250 U.S 616, 624 (1919) (Holmes, J., dissenting). Holmes observed the impotence of what he characterized as the "silly leaflet[s] by an unknown man" involved in the case. *Id* at 628 But he was hardly basing protection of speech on its being impotent, as Waldron suggests (*see* Waldron, *supra* note 15, at 1617), when he said that "we should be eternally vigilant against attempts

adequate evidence for any certainty about the guess whether suppression or freedom provides the best security, I think wisdom requires that choice favor liberty. Liberty is the choice if people are fundamentally good and worthy of respect – suppression is the choice if the opposite holds factually. We are worthy of intellectual and legal concern only if the former is true. For this reason, recognizing that the guess may turn out to be wrong, I would rather have hazarded the guess that justifies a concern with the circumstances and future of humanity. Only then would being right in the guess matter. Moreover, I suspect, given that the answer is not writ in stone, that such a guess can be part of a self-fulfilling prophesy. If so, it is clear which prophesy should be favored.

to check the expression of opinions that we loathe and believe to be fraught with death," 250 U.S. at 630, or when, in a later case, he argued that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way," Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J. dissenting).

4

Interview with Kenan Malik

Peter Molnar: Would you characterize some speech as "hate speech," and do you think that it is possible to provide a reliable legal definition of "hate speech"?

Kenan Malik: I am not sure that "hate speech" is a particularly useful concept. Much is said and written, of course, that is designed to promote hatred. But it makes little sense to lump it all together in a single category, especially when hatred is such a contested concept.

In a sense, hate speech restriction has become a means not of addressing specific issues about intimidation or incitement, but of enforcing general social regulation. This is why if you look at hate speech laws across the world, there is no consistency about what constitutes hate speech. Britain bans abusive, insulting, and threatening speech. Denmark and Canada ban speech that is insulting and degrading. India and Israel ban speech that hurts religious feelings and incites racial and religious hatred. In Holland, it is a criminal offense deliberately to insult a particular group. Australia prohibits speech that offends, insults, humiliates, or intimidates individuals or groups. Germany bans speech that violates the dignity of, or maliciously degrades or defames, a group. And so on.[1] In each case, the law defines hate speech in a different way.

One response might be to say: Let us define hate speech much more tightly. I think, however, that the problem runs much deeper. Hate speech restriction is a means not of tackling bigotry but of rebranding certain, often obnoxious, ideas or arguments as *immoral*. It is a way of making certain ideas illegitimate without bothering politically to challenge them. And that is dangerous.

PM: Setting aside legal restriction, would you differentiate between claims (that target certain groups) that should be challenged in political debate and claims

[1] *See generally Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (Sandra Coliver ed., Article 19 and University of Essex 1992).

This interview was conducted as an email exchange in January and February 2011. Eds.

5

Hate Speech and the Demos

Jamal Greene

It is sometimes said that the statist and aristocratic traditions of Europe render its political institutions less democratic than those of the United States. Richard Posner writes of "the less democratic cast of European politics, as a result of which elite opinion is more likely to override public opinion than it is in the United States."[1] If that is true, then there are obvious ways in which it figures into debates over the wisdom of hate-speech regulation. The standard European argument in favor of such regulation may easily be characterized as antidemocratic: Restrictions on hate speech protect unpopular minority groups from democracy run amok. The Nazi example states the paradigm case, even if the paradigm no longer describes the usual targets of such regulation.[2] By contrast, the American argument against hate-speech regulation is typically framed in democratic terms: Informed deliberation requires that all sides have an opportunity to be heard, with the most able policies emerging through a form of intellectual competition.[3] Or, more interestingly, full participation in a democratic community requires that self-expression not be limited to what others have deemed orthodox.[4]

There is another way, however, in which the relatively democratic character of American politics influences – or rather, should influence – the debate over

[1] Richard A. Posner, "The Supreme Court, 2004 Term Foreword A Political Court," 119 *Harv L. Rev* 31, 86 (2005); *see* Robert Post, "Hate Speech," in *Extreme Speech and Democracy* 123, 137 (Ivan Hare & James Weinstein eds., Oxford University Press 2009) (arguing that "democratic legitimation is a less pressing issue in Europe")

[2] *See* Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," Chapter 13 herein ("Whereas in Nazi Germany hate speech was perpetrated by the government as part of its official ideology and policy, in contemporary democracies it is by and large opponents of the government and, in a wide majority of cases, members of marginalized groups with no realistic hopes of achieving political power who engage in hate speech.")

[3] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[4] *See* West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943), C. Edwin Baker, "Autonomy and Hate Speech," in *Extreme Speech and Democracy*, *supra* note 1, at 139, 142–6.

regulation of offensive speech. Scholars of U.S. constitutional law have increasingly recognized that constitutional argument must not simply appeal to democratic norms but must also attend to democratic conditions. Constitutional law is not fashioned through Socratic argument among scholars and judges, nor does it follow merely from the currents of elite opinion, but it results rather from a dialogue between political institutions – including the Supreme Court – and social and political movements, against a background of often exogenous cultural conditions. Thus, we should understand *Brown v. Board of Education* not as an epiphany inspired by the force of Earl Warren's charisma or Felix Frankfurter's intellect but as a piece of a movement strategy led by the National Association for the Advancement of Colored People (NAACP) and enabled, in part, by antipathy toward fascism and Stalin's Soviet Union.[5] Changes in U.S. sex-equality law in the 1970s can be tied directly to the sexual revolution of the 1960s and the political forces behind the Equal Rights Amendment.[6] The difficulty of formal constitutional amendment through Article V requires that judges and other constitutional actors retain a degree of receptivity to popular preferences expressed through movement politics and occasioned by social change. As Robert Post and Reva Siegel write, "if the Court's interpretation of the Constitution seems wholly unresponsive, the American people will in time come to regard it as illegitimate and oppressive."[7]

The lessons of what Post and Siegel have called "democratic constitutionalism" have seldom been applied to the debate over regulation of hate speech. A ban on hate speech is a decision of constitutional dimension, and yet arguments for or against it typically rely wholly on the force of their reasoning, with little or no attention given to what more will be required for those arguments to be accepted and to acquire constitutional status. In the free-speech area no less than in other realms of constitutional law, a brilliant argument is neither sufficient nor even necessary to effect constitutional change in the United States.[8] Such arguments must engage the American people in the right way, and at the right time. This chapter, then, explores some of the positive conditions relevant to reform of hate-speech regulation. Although I glean some insight through comparison with Europe, I focus primarily on the United States, where empirical data are most complete and where the idea of democratic constitutionalism has been most fully developed

The affluents of constitutional change in the United States include, on the one hand, political and social movements, and on the other, cultural changes that may be exogenous to those movements. Sections I and II of this chapter consider each

[5] Brown v. Board of Education, 347 U.S. 483 (1954). *see* Mary Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton University Press 2000)

[6] *See* Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA," 94 *Calif. L. Rev.* 1323 (2006).

[7] Robert C. Post and Reva B. Siegel, "Democratic Constitutionalism," in *The Constitution in 2020*, at 25, 28 (Jack M. Balkin & Reva B. Siegel eds., Oxford University Press 2009)

[8] *See* Daniel A. Farber, "The Case Against Brilliance," 70 *Minn. L. Rev.* 917 (1986)

dimension in turn. Section I discusses the role that movement politics has played in developing and retaining a strong speech-protective norm in the United States. As Samuel Walker and others have persuasively argued, hate-speech regulation has been generally unsuccessful in the United States over the last half century in large measure because of opposition within the civil rights community.[9] Those who have organized in favor of antidiscrimination laws of other sorts have viewed speech codes as either counterproductive or outright contrary to their aims. Europe has not, by and large, seen comparable opposition to hate-speech regulation by its putative beneficiaries.

Section II addresses the cultural conditions that must attend any successful movement for reform of hate speech laws. I begin by discussing public opinion on regulation of offensive speech. The reader will not be surprised to learn that Americans today appear to support hate speech regulation far less than Europeans. The reader may be surprised to learn, however, that Americans support such regulation far less today than they did a decade ago. Indeed, survey data suggest that, with respect to the desirability of legal restrictions on racially offensive speech, the views of the American people of 1997 approximate those of Europeans of 2002. The relative receptivity of Americans just ten years ago to regulation of offensive speech suggests that a set of mutable conditions influences public opinion in this area. I offer and evaluate three possible considerations that might account for these changes: trust of government, sensitivity to international opinion; and opportunity for exit from prevailing community norms.

Section III discusses strategies for altering the current U.S. consensus on regulation of hate speech. Federalism's preference for piecemeal legislation may frustrate any reform movement but may at the same time allow for the trial and error needed for well targeted intervention. Reforms might aim either at actively altering the background conditions I have identified or merely tailoring energy to opportunity. Whether or not public attitudes permit a norm in favor of hate-speech regulation to calcify may ultimately be beyond the control of reformers, but greater attention to public attitudes can at least tell them whether the iron is hot.

I

The cleavage between the restrictive European and the permissive American legal postures toward hate speech has generated extensive discussion, including in this volume. In brief, although laws and prosecutorial practices vary from state to state, virtually every European country has enacted content-based restrictions on racially insulting or inciting speech that would be patently unconstitutional in the United States.[10] As interpreted by the Supreme Court, the U.S. Constitution forbids states or the federal government from adopting laws required by Article 4 of the International Convention on the Elimination of All forms of Racial Discrimination (ICERD) and by Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), and the Senate has accordingly attached reservations to the United States' ratifications of those treaties.[11] Both the federal government and many state and local governments provide enhanced criminal penalties for violent crimes motivated by racial or religious animus,[12] but over the last half century, the Supreme Court has repeatedly ruled against content-based restrictions on offensive speech, and few jurisdictions have sought to test those decisions.[13]

Although it is tempting to ascribe the American position on hate speech to a kind of libertarian cultural DNA, it was not inevitable that differences with the rest of the western world would develop in this area. Consider the state of the United States in 1952. Proposed legislation outlawing group libel had been cropping up at all levels of American government; a bill introduced in Congress in 1943 by New York Congressman Walter Lynch that would have prohibited the mailing of writings expressing racial or religious hatred received three days of hearings before the Committee on Post Offices and Post Roads.[14] *New York ex rel. Bryant v. Zimmerman*, in which the Supreme Court upheld a New York requirement that the Ku Klux Klan provide membership lists, was good law, as was *Chaplinsky v. New Hampshire*, which exempted "fighting words" from First Amendment protection.[15] The Court had just decided *Dennis v. United States*, in which it upheld a conviction for conspiracy to advocate overthrow of the government; *Feiner v. New York*, in which it allowed the state to prosecute Irving Feiner for arousing public anger from a soapbox; and *Beauharnais v. Illinois*, upholding the conviction of a white supremacist who had violated the state's group libel law.[16]

[9] Samuel Walker, *Hate Speech. The History of an American Controversy* (University of Nebraska Press 1994).

[10] *See* Frederick Schauer, "The Exceptional First Amendment," in *American Exceptionalism and Human Rights* 29, 34–8 (Michael Ignatieff ed., Princeton University Press 2005).

[11] Article 4 of the ICERD requires States Parties to criminalize "all dissemination of ideas based on racial superiority or hatred," and to prohibit any organizations or propaganda "which promote and incite racial discrimination." Article 20(2) of the ICCPR requires prohibition of "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."

[12] *See* 18 U.S.C. § 245; Wisconsin v. Mitchell, 508 U.S. 476 (1993).

[13] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Texas v. Johnson, 491 U.S. 397 (1989); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); *see also* Collin v. Smith (*The Skokie case*), 578 F.2d 1197 (7th Cir. 1977), *cert. denied*, 439 U.S. 916 (1978). *Cf.* Virginia v. Black, 538 U.S. 343 (2003).

[14] *See* Joseph Tanenhaus, "Group Libel," 35 *Cornell L.Q.* 261, 294 (1950); Joseph Tanenhaus, "Group Libel and Free Speech," 13 *Phylon* 219 (1952).

[15] New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[16] Dennis v. United States, 341 U.S. 494 (1951); Feiner v. New York, 340 U.S. 315 (1951); Beauharnais v. Illinois, 343 U.S. 250 (1952). Notably, three years before the Court's decision in *Beauharnais*, the Truman Administration helped draft and endorsed the German Basic Law, which expressly grounds

It was also in 1952 that the Supreme Court first set *Brown v. Board of Education* f[illegible] argument.[17] That case, and the movement that agitated for it, bears crucially on th[illegible] doctrine that would follow. The anti–hate speech laws that swept across Europe in the 1960s, 1970s, and 1980s were born of the same human rights impulse that facilitate[d] the American civil rights movement. And it is easy to see how a Court primed to op[en] the nation's racially segregated schools to black students would have sympathies f[or] the law it allowed Illinois to apply to Joseph Beauharnais, who had distributed a leafl[et] calling for the mayor of Chicago to "halt the further encroachment, harassme[nt] and invasion of white people, their property, neighborhoods and persons, by t[he] Negro."[18]

But civil rights groups were at best ambivalent toward legislation aimed at curbi[ng] offensive speech, and the NAACP actively opposed the Lynch bill.[19] An example s[hows] show why. In 1966, the Congress of Racial Equality (CORE) led a march into the a[ll-] white Chicago suburb of Cicero, Illinois, to demand open housing. Cicero, whi[ch] sits 13 miles due south of Skokie, had been the site of a notorious riot in 1951 in whi[ch] thousands of angry white residents had burned and looted an apartment buildi[ng] to prevent a black family from moving in. A year before the CORE demonstratio[n] a black teenager looking for a summer job in Cicero had been beaten to death [by] a white gang.[20] The CORE marchers were met by several hundred hecklers wh[o] hurled bottles, rocks, eggs, and small explosives and had to be restrained by Natio[nal] Guard troops and local police.[21]

Civil rights activism required protection against a heckler's veto.[22] It requir[ed] subversive organizing. It required fighting words. Indeed, during the Jim Crow e[ra] otherwise pacific words – "No!" comes readily to mind – could, when uttered [to] members of particular communities, lead immediately and predictably to violenc[e]. Feiner had been made to get off his soapbox because he had given "the impressi[on]" that he was endeavoring to arouse the Negro people against the whites, urging th[em] they rise up in arms and fight for equal rights."[23] The sanction given in *Bryant* [v.] states to require membership lists of subversive organizations had been used again[st] the NAACP and leftist groups in the South in the 1950s, until the Supreme Cou[rt]

limitations on its guarantee of freedom of expression in the compet.ng "right to personal honor." [Art.] 5(2). The Basic Law also outlaws associations "that are directed against the constitutional order or [the] concept of international understanding." Art. 9(2).

17 Brown v. Board of Education, 344 U.S. 1 (1952).

18 *Beauharnais*, 343 U.S. at 252.

19 Walker, *supra* note 9, at 85.

20 *See* Paul L. Street, *Racial Oppression in the Global Metropolis. A Living Black Chicago History* 103 [illegible] (Rowman & Littlefield 2007).

21 *See* Donald Janson, "Guards Bayonet Hecklers in Cicero's Rights March," *N.Y. Times*, Sept. 5, 19[illegible] at 1.

22 I refer here to restrictions on speech .mposed because of the anticipated (or actual) incivilit[y] offended listeners.

23 *Feiner*, 340 U.S. at 317.

declared such practices unconstitutional in *NAACP v. Alabama ex rel. Patterson*.[24] When the Court gave First Amendment protection to libelous statements in 1964, it was in the service of protecting the ability of civil rights groups to mobilize public opinion in their favor.[25]

It is not just that any speech regulation aimed at maintaining civility in public [life] may disproportionately affect out groups.[26] Hate-speech restrictions in particular have a history of missing their originally intended marks. New Jersey's 1935 race-hate statute, born of violent confrontations between Nazi sympathizers and their antagonists, was used only against a group of Jehovah's Witnesses before the New Jersey Supreme Court declared the law unconstitutional in 1941.[27] In Great Britain, the Public Order Act 1936, enacted in response to the fascist threat, was used against Bertrand Russell and other antinuclear protesters in 1961. High-profile prosecutions under Britain's Race Relations Act 1965 included that of Black Power leader Michael Abdul Malik, who received a one-year prison sentence for alleged incitement of hatred against whites, and four members of the Universal Coloured People's Association, three of whom were convicted and fined a total of £270 for the offense.[28] Laws aimed at protecting civil society from groups seeking to disrupt the social and political order may be a form of "militant democracy," but they may not enjoy the unqualified support of those who wish to dismantle a majoritarian regime marked by apartheid or other indicia of fundamental injustice. "In the absence of real political power," writes Walker, "words – extreme, emotionally loaded words – are [one] of the few devices available to the powerless for capturing attention, dramatizing [an] issue, and motivating people for change."[29]

All of which is to say that the pronounced American trend away from hate-speech restrictions when much of the world was heading the opposite way was not for lack of argument but for lack of an arguer. The ACLU fervently opposed such laws [while] civil rights groups were disapproving or, at best, conflicted. Racists – no small constituency – were understandably self-interested. Other Americans were ambivalent [and] did not much care. That is no formula for a constitutional moment. Jack Balkin has written that "[e]ach generation makes the Constitution their Constitution by calling upon its text and its principles and arguing about what they mean in their own time."[30] Mobilized groups in the United States in the 1950s and 1960s decided

24 357 U.S. 449 (1958).

25 New York Times v. Sullivan, 376 U.S. 254 (1964).

26 See Kent Greenawalt, *Speech, Crime, and the Uses of Language* 298 (Oxford University Press 1992). Walker, *supra* note 9, at 55–6, *see* State v. Klapprott, 22 A.2d 877 (N.J. 1941).

27 See Richard P. Longaker, "The Race Relations Act of 1965: An Evaluation of the Incitement Provision," *Race & Class* 125, 129 (1969); R. v. Malik, 52 Crim. App. 140 (1968) (Eng.); "Sentences Today on Four Coloured Men," *The Times* (London), Nov. 29, 1967, at 3; "Race Speeches £270 Fines," *The Times* (London), Nov. 30, 1967, at 20.

28 Walker, *supra* note 9, at 111–12.

29 Jack M. Balkin, "Abortion and Original Meaning," 24 *Const. Commentary* 291, 302 (2007).

that cases like *West Virginia State Board of Education v. Barnette*,[31] *Terminiello v. Chicago*,[32] *NAACP v. Alabama ex rel. Patterson*,[33] and *Cohen v. California*[34] better expressed the meaning of the free-speech guarantee in their time and for their purposes than cases like *Bryant*,[35] *Chaplinsky*,[36] *Feiner*,[37] and *Beauharnais*.[38]

No serious domestic movement to challenge the American position on hate speech emerged until the 1980s, during controversies over campus speech codes. In part because of affirmative-action programs, once marginalized minorities were reaching critical mass on college campuses. A series of racist incidents across a surprisingly wide range of schools prompted many universities to adopt restrictions on certain racially offensive or intimidating speech and conduct. Minority groups and white sympathizers, many born well after the peak of the civil rights movement, viewed such restrictions in the same self-evident terms that many Europeans do today, and organized to promote them.[39]

The courts saw matters differently. Federal district courts invalidated the codes at the University of Michigan and the University of Wisconsin.[40] The Supreme Court struck down state and federal laws outlawing the burning of the American flag and a city ordinance criminalizing the display of symbols likely to arouse racial or religious hatred.[41] The doctrinal carapace against content based regulation of offensive speech was too thick for speech-code activists to penetrate. Some measure of organization was present, but it was not sufficient to animate the population or move the courts. The activists failed to make their issue, and their pain, the nation's. Understanding why the movement failed is critical to assessing the prospects for bridging the present hate-speech divide between the United States and the rest of the western world. The episode illustrates, not for the first time, that while an argument and an arguer are necessary to produce constitutional change, they are not sufficient. Constitutional argument also needs the right audience.

[31] 319 U.S. 624 (1943) (holding that the First Amendment forbids compelling students to salute the American flag).

[32] 337 U.S. 1 (1949) (striking down a Chicago ordinance criminalizing speech that "stirs the public to anger, invites dispute [or] brings about a condition of unrest").

[33] 357 U.S. 449 (1957) (holding that a state law requiring the Alabama NAACP affiliate to submit membership lists violated the group members' associational rights).

[34] 403 U.S. 15 (1971) (invalidating the conviction of a man arrested for wearing a jacket with the words "Fuck the Draft" in a Los Angeles courthouse).

[35] 278 U.S. 63 (1928).

[36] 315 U.S. 568 (1942).

[37] 340 U.S. 315 (1951).

[38] 343 U.S. 250 (1952).

[39] *See* Walker, *supra* note 9, at 129–30. On campus speech codes generally, see Arthur Jacobson and Bernhard Schlink, "Hate Speech and Self-Restraint," Chapter 12 herein.

[40] Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989); UWM Post v. Board of Regents of the University of Wisconsin, 774 F. Supp. 1163 (E.D. Wisc. 1991).

[41] Texas v. Johnson, 491 U.S. 397 (1989), United States v. Eichman, 496 U.S. 310 (1990); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

II

Those who promoted campus speech codes in the 1980s might have had a significant audience in the 1940s, and perhaps in the 1950s, but did not have enough of one in their own time. At least two possible lessons emanate from their experience. It might be that the American people are inalterably libertarian on speech issues, our collective consciousness permanently fixed by the Warren Court rulings and their progeny. But it is more plausible, and more true to our constitutional heritage, to conclude that the American people are inalterably dynamic, viewing arguments in new different lights of changing circumstance. In light of that condition, it would be useful to know what it takes to move public attitudes on hate-speech regulation, whether or not one supports reforming the American posture in this area. The literature on hate speech contains surprisingly little, however, even on what those attitudes might be.

The space of this chapter is too short for a comprehensive treatment, but it is possible to report some data and to critically evaluate some hypotheses. In brief, and as discussed in Subsection A, the American public today is far less enthusiastic about hate-speech regulation than its European counterpart, and, significantly, has become increasingly opposed to such regulation over the last decade. Subsection B proposes and assesses three possible explanations: a relative lack of trust in government; a frosty disposition toward international and transnational norms; and increasing opportunities for "exit" from community life.

A

Two U.S. studies are most relevant for our purposes. Each year since 1997 (with the exception of 1998), the First Amendment Center (FAC) has commissioned a survey in which it asked American adults whether they strongly agree, mildly agree, mildly disagree, or strongly disagree with the following proposition: "People should be allowed to say things in public that might be offensive to racial groups." FAC has asked the same question with respect to religious groups each year since 2000 (with the exception of 2004). I report the FAC results in Table 5.1.

I supplement the FAC results with original data from a July 2009 Massachusetts Institute of Technology (MIT) survey of Americans' constitutional perceptions and political values.[42] The MIT survey asked 1,677 American adults the same two hate-speech questions as the FAC survey.[43] The results of the MIT survey are reported in Table 5.2. These results are of interest both as a snapshot and longitudinally. First, Americans are divided on whether people should be allowed to say things in public

[42] The MIT survey was commissioned by Stephen Ansolabehere with the collaboration of Nathaniel Persily and me.

[43] The MIT survey was an Internet-based survey and did not include a "don't know" option. The FAC survey comprised in-person interviews.

TABLE 5.1 *First Amendment Center survey, 1997–2008*

People should be allowed to say things in public that might be offensive to racial groups.

	1997	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Strongly agree	8%	8%	15%	16%	14%	18%	17%	21%	22%	21%	24%
Mildly agree	15%	13%	17%	18%	20%	20%	18%	22%	20%	21%	19%
Mildly disagree	14%	16%	15%	15%	16%	14%	14%	14%	13%	12%	12%
Strongly disagree	61%	62%	52%	49%	48%	47%	49%	39%	42%	44%	42%
DK/Ref.	2%	1%	1%	2%	1%	1%	1%	3%	2%	2%	2%

People should be allowed to say things in public that might be offensive to religious groups.

	2000	2001	2002	2003	2005	2006	2007	2008
Strongly agree	22%	25%	29%	26%	23%	31%	32%	32%
Mildly agree	24%	22%	28%	23%	25%	24%	28%	23%
Mildly disagree	15%	16%	14%	14%	15%	16%	12%	12%
Strongly disagree	38%	35%	28%	36%	35%	27%	26%	30%
DK/Ref.	1%	3%	2%	1%	4%	2%	2%	2%

Source. The First Amendment Center, 1997–2008, State of the First Amendment 1997 2008 [computer files] (Storrs, CT, Center for Survey Research and Analysis, University of Connecticut [producer and distributor]).

that might be racially or religiously offensive Forty-eight percent of MIT survey respondents said that people should be permitted to make racially offensive comments, and 56 percent said the same of religiously offensive comments. Affirmative responses in the MIT survey are slightly higher in each category than in the most recent FAC survey, in which 43 percent said yes as to racially offensive speech and 55 percent said yes as to religiously offensive speech. There are also marginal differences in intensity of viewpoint. Only 20 percent of MIT respondents, compared

TABLE 5.2. *MIT survey, 2009*

	People should be allowed to say things in public that might be offensive to racial groups	People should be allowed to say things in public that might be offensive to religious groups
Strongly agree	20%	26%
Mildly agree	28%	30%
Mildly disagree	23%	21%
Strongly disagree	29%	24%

Source: Massachusetts Institute of Technology, 2009, *Attitudes & Perceptions About the Constitution* (Menlo Park, CA: Knowledge Networks)

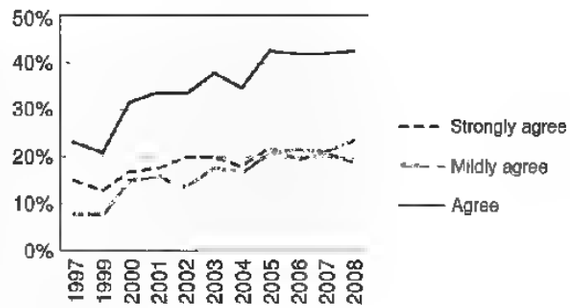

CHART 5.1. Allow Racially Offensive Speech

.o 24 percent of FAC respondents, "strongly" agreed that racially offensive speech should be permitted, and 26 percent of MIT respondents said the same of religiously offensive speech, compared to 32 percent in the FAC survey. There is sense in he observed distinction between race and religion. Certain strongly held religious iews may be impossible to disaggregate from disparagement of the religious views f others As Ivan Hare writes, "[R]eligions inevitably make competing and often ncompatible claims about the nature of the true god, the origins of the universe, the path to enlightenment, and how to live a good life and so on."[44] Religious offense s therefore, categorically, a more problematic candidate for hate-speech regulation than racial offense.[45]

The most striking survey result is the trend over time, particularly on race. As Chart 5.1 illustrates, the proportion of Americans who believe that racially offensive speech should be permitted nearly doubled from 1997 to 2008; the proportion holding that view "strongly" nearly tripled The proportion of Americans who strongly disagree that racially offensive speech should be permitted – that is, those espousing a more stereotypically European view decreased by nearly a third The MIT survey, although reflecting a different distribution in intensity of viewpoint, is consistent with the overall picture. Americans are far more permissive of hate speech today than they were in the mid-to-late 1990s

The upward trend in acceptance slices clean through demographics. As one might expect, tolerance of hate speech is more prevalent among whites than blacks and Hispanics, and among the college educated Minorities are usually the intended beneficiaries of hate-speech restrictions, and educated people are more likely to be familiar with the First Amendment. But the sharp upward slope in tolerance for offensive speech persists across racial groups and regardless of education level.

[44] Ivan Hare, "Blasphemy and Incitement to Religious Hatred," in *Extreme Speech and Democracy*, *supra* note 1, at 289, 308.

[45] Witness, for example, the controversy in the United Kingdom over the Racial and Religious Hatred Act 2006, which some feared would outlaw certain passages in the Bible and the Koran. *See* "The Tongue Twisters," *The Economist*, Oct. 13, 2007

People with postgraduate degrees were nearly twice as likely to agree that racially offensive speech should be permitted in 2006 than they were in 1999. Those with only high-school educations were slightly more than twice as likely.[46] Black Americans are roughly two-thirds as likely as whites to take a permissive attitude toward racially offensive speech, but both groups are just about two and a half times as likely to hold that view today compared to a decade ago.

These results should alarm advocates for reform of the American position. Without an explanation for so dramatic a trend and a strategy for reversing it, the best arguments for reform will fall on deaf ears. At the same time, it may hearten reformers to know that Justice Jackson was only partly right: Rejecting government prescription of political orthodoxy is surely a star in the American constitutional constellation, but it is by no means fixed.[47] I have already discussed the crossroads of 1952. There is little evidence that Americans before that period were unusually tolerant of offensive speech. In the 1930s, numerous state and local governments banned either pro-Nazi or pro-Communist propaganda and made life generally difficult for fascist groups.[48] In 1946, at the height of the proliferation of group libel bills, six in ten Americans told Gallup that it should be illegal to join the Ku Klux Klan,[49] even as a former Klansman – Hugo Black – sat on the Supreme Court. As of 1952, the United States might easily have taken a different direction on hate-speech restrictions.

Was 1999 also a crossroads? Was 2009 a crossroads, with some Americans beginning to moderate their absolutism? If so, then why? The next subsection takes up that question, but first it is useful to consider whether American opinion is in fact an outlier compared to Europe. We lack comprehensive comparative data on European attitudes toward hate-speech regulation during the period for which U.S. data are available. The best available data may be from the European Social Survey (ESS), which in 2002 asked respondents in twenty-one European countries and Israel to rate on a scale of 0 to 10 whether a law against promoting racial hatred was a good or a bad thing for a country. More than three in ten respondents (31 percent) gave a response of "10," indicating that such a law was "extremely good" for a country. Nearly six

[46] I do not have sufficient data to compile these numbers for 2007 and 2008, but it may be useful to report that the educational distribution in the 2009 MIT survey differs in important ways from the most recently available FAC survey. Namely, less educated people seem relatively less inclined to favor speech restrictions in the 2009 survey. Approximately half of all high school graduates in the MIT survey agreed that offensive speech should be allowed, compared to one-third in the 2006 FAC survey. Conversely, slightly more than half of MIT survey respondents with postgraduate degrees agreed that offensive speech should be permitted, compared to more than 60 percent in the 2006 FAC survey.

[47] *Cf. Barnette*, 319 U.S. at 642 (Jackson, J.) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.").

[48] Walker, *supra* note 9, at 40; *see* Joel H. Spring, *Images in American Life: A History of Ideological Management in Schools, Movies, Radio, and Television* 52, 92–3 (SUNY Press 1992).

[49] Roper Center for Public Opinion Research, Gallup Poll (Aug. 16–21, 1946).

in ten (59 percent) gave a response of "8" or higher, and nearly three-quarters (73 percent) answered "6" or higher.[50]

Drawing reliable comparisons between the ESS data and the FAC and MIT surveys is perilous given the differences in question wording, which cannot be regarded as trivial. The best we can say, perhaps, is that nearly three out of four Europeans in 2002 would at least mildly disagree that racially offensive speech should be permitted. That figure meaningfully exceeds the number of Americans holding similar views in 2002, vastly exceeds the number holding such views in 2009, and approximates the number holding such views in the late 1990s.

We can draw a more direct comparison from the 2004 International Social Survey Programme (ISSP), which asked respondents in thirty-nine countries around the world various questions related to citizenship, one of which was "Should people prejudiced against any racial group be allowed to hold public meetings?" Respondents were asked whether such groups should definitely, probably, probably not, or definitely not be permitted to hold such meetings.[51] Of the countries surveyed, which included much of Europe, no country had a greater proportion of respondents answer "definitely" or "probably" than the United States (39 percent). As Chart 5.2 shows, within Europe, only Norway (37 percent) was comparably tolerant of meetings of racist groups. Notably, only 9 percent of respondents in Hungary answered this question in the affirmative, even though Hungary may be Europe's most speech-protective country.[52] In a large majority of countries surveyed, the proportion of respondents who answered "definitely" or "probably" was less than half the proportion in the United States.

B

Explaining the differences between Europe and the United States on hate speech has engaged some of the brightest minds in the world of international and comparative public law.[53] Far less attention has been paid to the differences within the United States over time. Yet understanding these internal differences is vitally important for those who wish to moderate the American posture. Dramatic evolution in American public attitudes, even over relatively brief periods, suggests that events short of catastrophic genocide may indeed be capable of changing the minds of the American people. We lack sufficient data to draw firm conclusions as to what those events might be, but some possibilities recommend themselves. I propose three considerations that

European Social Survey Round 1 Data (2002/2003), Data file edition 6.1. Norwegian Social Science Data Services, Norway (Data Archive and distributor of ESS data).

International Social Survey Programme 2004: Citizenship (ISSP 2004). For ease of comparison over time, the ISSP separately samples East German and West German respondents.

See Peter Molnar, "Towards Improved Law and Policy on 'Hate Speech': The 'Clear and Present Danger' Test in Hungary," in *Extreme Speech and Democracy*, *supra* note 1, at 237.

[53] *See, e.g.*, Rosenfeld, *supra* note 2. *See also* Post, *supra* note 1; Schauer, *supra* note 10.

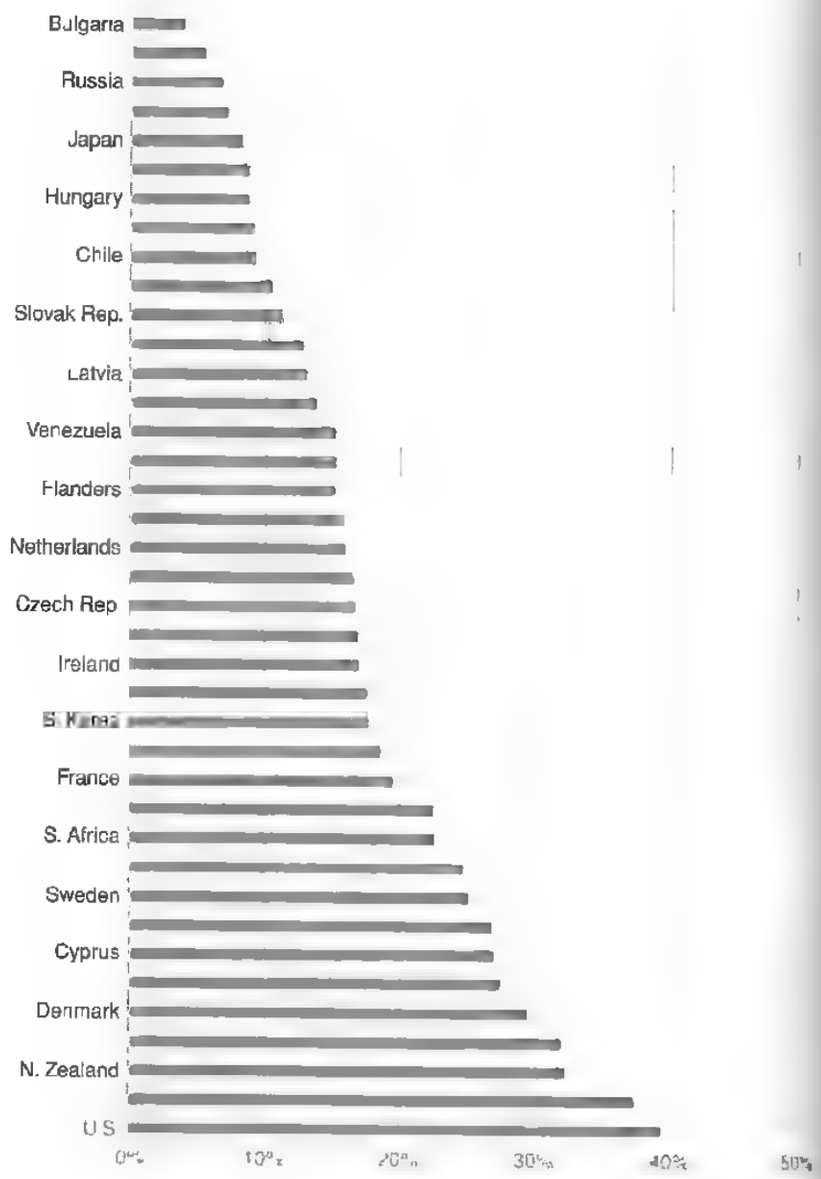

CHART 5.2. Racist Meetings Should Definitely or Probably Be Permitted

affect whether the American people of a particular time are relatively receptive laws restricting hate speech: trust in government; sensitivity to international norms; d opportunities for exit

1. Trust in Government

he Rasmussen polling organization asked in a 2008 survey of American adults ether it would be "a good idea for the United States to ban hate speech." Twenty-ght percent of respondents answered yes, 53 percent said no, and 19 percent were sure.[54] Those numbers are loosely consistent with the numbers reported in the AC and MIT surveys.[55] The same Rasmussen survey followed up, however, with following question. "Which is better – allowing free speech without government terference or letting government decide what types of hate speech should be nned?" Only 11 percent of respondents said that it is better to let government ide; 74 percent said it was preferable to allow unfettered free speech. Even for any of those who were not bothered by restrictions on hate speech, the specter of vernment deciding which speech would be permitted and which would not was unacceptable.

One need only sit in on a grade school social studies class to glean that mistrust government is part of the national operating instructions for the United States. spicion of top-down political authority is evident in the bill of particulars detailed the Declaration of Independence and in the system of checks and balances bedded in the Constitution and celebrated by *The Federalist*. "If angels were govern men," Madison says in Federalist No 51, "neither external nor internal trols on government would be necessary."[56]

Significantly, however, Americans today trust government far less than they used Various polls over the last half century have measured trust in government by king Americans the following question: "How much of the time do you think you can trust the government in Washington to do what is right? Just about always, most of the time, or only some of the time?"[57] The number of Americans saying they can trust the federal government all or most of the time stood at 73 percent in 58; it was 17 percent in October 2008. Of course, October 2008 was just before

Toplines Free Speech, June 12, 2008, Rasmussen Reports (2008)

It is not entirely clear how "yes" or "no" in the Rasmussen survey best correspond to the scale of agreement reported in the FAC and MIT surveys. It should also be noted that Rasmussen primed respondents by noting that "[m]any European countries and Canada do not have full freedom of speech, but instead have laws to prevent hate speech." There is reason to believe that this kind of priming is likely to depress the number of respondents in favor of such laws. See *infra* Section II.B.2.

The Federalist No 51, at 322 (James Madison) (Clinton Rossiter ed., New American Library 1961).

The data from 1958 to 1996 come from the American National Election Studies *See Deconstructing Distrust: How Americans View Government* 87 (Pew Center for People & the Press 1998). Subsequent data comes from surveys conducted by the Pew Center for People & the Press (1998), ABC News/*Washington Post* (2000), and CBS News/*New York Times* (2002–2008).

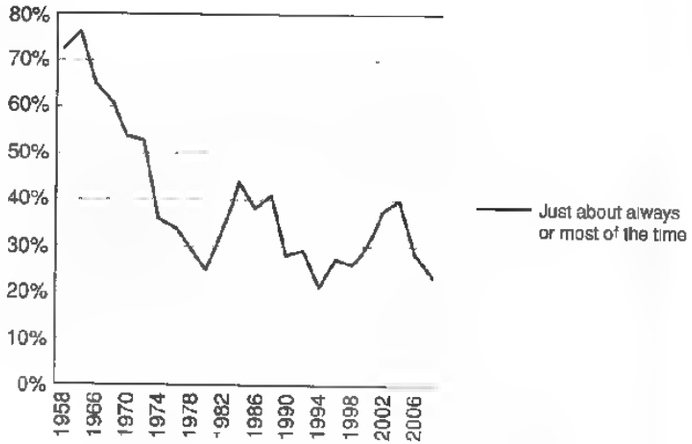

CHART 5.3. Trust Government to Do Right Thing

an unpopular President, George W. Bush, was replaced by Barack Obama. But as Chart 5.3 demonstrates, the downward secular trend in Americans' trust in their government extends beyond any one administration. The last time a majority of Americans said they trusted government all or most of the time was in 1972, just before the Watergate scandal ended Richard Nixon's presidency.

A people who believe that government usually cannot be trusted will not lightly task that same government with prosecuting citizens for offensive speech.[58] Both *Brandenburg v. Ohio*, which states the modern American standard for criminalizing incitement,[59] and *Cohen v. California*, which allowed clothing bearing a profane message to be worn in a courthouse,[60] were handed down amid a precipitous decline in Americans' faith in their government. Indeed, Henry Louis Gates Jr. has argued that the campus speech-code movement resulted in part from the newfound trust of minority groups for authority figures on campus. "The contemporary aim is not to resist power," wrote Gates, "but to enlist power."[61] If some minorities have been feeling increasingly close to power within collegiate gates, other Americans have

[58] *See* Frederick Schauer, *Free Speech: A Philosophical Inquiry* 86 (Cambridge University Press 1982) ("Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense").

[59] 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[60] 403 U.S. 15 (1971).

[61] Henry Louis Gates Jr., "Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights," *New Republic*, Sep. 20 & 27, 1993, at 44.

been feeling increasingly alienated from political institutions more generally. And those who distrust government appear less likely to favor hate-speech restrictions. The MIT survey asked respondents to indicate which of the following statements they agreed with: "The less government, the better," or "There are more things that government should be doing." Even controlling for whether people generally identify as liberal or conservative, opponents of hate-speech restrictions are somewhat more likely to oppose big government.[62]

It is not clear whether Europeans, for their part, in fact trust the state any more than Americans do. A 1998 survey commissioned by Pew found that only 45 percent of respondents in the United Kingdom, France, Germany, Italy, and Spain said "no" when asked whether they "basically trust the state," compared to 56 percent of Americans. But the most recent ESS, in 2006, found that in rating trust of their parliaments on a scale of 0–10 – from "no trust at all" to "complete trust" – 54 percent of Europeans registered 4 or lower.[63] And in the 2002 ESS survey, neither trust in parliament nor trust of politicians was significantly correlated with whether respondents believe a hate-speech law is desirable. The 2004 ISSP asked a similar question to the one that has been most frequently asked in the United States: whether and to what extent respondents agree that "[m]ost of the time we can trust people in government to do what is right." The United States is no particular outlier on this question, nor are responses to the trust question significantly correlated with responses to the racist public meeting question.[64]

All told, we lack both the data and a sufficiently persuasive story to establish trust in government as any more than a partial explanation for the recent surge in American tolerance for hate speech. It is true that in the years since 2002, Americans' distrust in government has correlated quite nicely – on the order of 0.8 – with permissive attitudes toward racial hate speech. But from 1997 to 2001, the correlation was insignificant, indeed marginally negative. Results from the FAC survey indicate that American tolerance for certain other kinds of speech regulation – for example, restrictions on religious hate speech and flag burning – have correlated significantly with Americans' trust in government over the last decade. But attitudes toward restrictions on offensive song lyrics are largely unchanged over the same period.[65] It may be that, at least in the United States, trust in government is a precondition for an anti-hate speech constitutional norm, but is not sufficient without more.

[62] *See* MIT Survey, *supra* note 42.

[63] The Pew results and the ESS results are not necessarily inconsistent. Each of the four Western European countries surveyed in the Pew study that were included in the 2006 ESS – Italy did not participate – had a proportion of "5 or lower" responses on the ESS scale of relative trust in parliament that was below the Europe-wide average.

[64] *See* ISSP 2004, *supra* note 51.

[65] *See* FAC Survey, *supra* Table 5.1.

2. Sensitivity to International Norms

Shame is an essential weapon in the arsenal of the international human rights advocate.[66] Louis Henkin writes of enforcement of human rights norms: "Intergovernmental as well as governmental policies and actions combine with those of NGOs and the public media, and in many countries also public opinion, to mobilize and maximize public shame. The effectiveness of such inducements to comply is subtle but demonstrable."[67] The notion that shame can provoke nations to act against their own interest may come across as naively anthropomorphic, and the internal dynamics of the process are indeed more complicated than the invocation of raw human emotion suggests.[68] It is difficult to dispute, however, that a people's basic sensitivity to world opinion is nearly indispensable in encouraging them to internalize international norms.

It is a familiar complaint within the international human rights community that as Frederick Schauer has written, "American courts, American lawyers, and the American constitutional culture have been stubbornly anti-international, far too often treating foreign influence as a one-way process, in which Americans influenced others but were little influenced in return."[69] Jed Rubenfeld suggests quite plausibly that while the Second World War's principal lesson for Europe was that nationalism is dangerous, the take-home across the Atlantic was that Americans are exceptional.[70] Within American domestic politics, the fact that the United States stands alone on some question of international law has long been an argument both for and against compliance. This at-best ambivalent posture poses particular challenges for those who wish to elevate hate-speech restrictions to the status of customary international law.

Domestic enthusiasm for American exceptionalism appears to have become particularly pronounced since September 11, 2001.[71] A foreign-planned attack on domestic soil is bound to provoke nationalism, but international criticism of the U.S. intervention in Iraq seemed to exacerbate the usual jingoism that accompanies military retaliation. The reaction by some to occasional citation of foreign or transnational law in U.S. court decisions provides a microcosmic window into the new nationalism. Three months after the U.S.-led invasion of Iraq, the Supreme Court decided *Lawrence v. Texas*, in which it invalidated the state's prohibition on

[66] *See* Robert F. Drinan, *The Mobilization of Shame: A World View of Human Rights* (Yale University Press 2002).

[67] Louis Henkin, "Human Rights: Ideology and Aspiration, Reality and Prospect," in *Realizing Human Rights: Moving from Inspiration to Impact* 3, 24 (Samantha Power & Graham Allison eds., Palgrave Macmillan 2000).

[68] *See, e.g.*, Harold Hongju Koh, "Why Do Nations Obey International Law?," 106 *Yale L.J.* 2599 (1997).

[69] Schauer, *supra* note 10, at 51.

[70] Jed Rubenfeld, "Unilateralism and Constitutionalism," 79 *N.Y.U. L. Rev.* 1971 (2004).

[71] *See* Harold Hongju Koh, "American Exceptionalism," 55 *Stan. L. Rev.* 1479, 1496 (2003).

same-sex sodomy.[72] In the course of his majority opinion, Justice Kennedy cited four decisions of the European Court of Human Rights, most prominently *Dudgeon v. United Kingdom*, and referred to a brief filed by former U.N. High Commissioner for Human Rights Mary Robinson, which discussed the laws of other nations.[73] Within one year of the *Lawrence* decision, several interest groups had called for the impeachment of any federal judge who cites foreign law while interpreting the U.S. Constitution.[74] Both the House and the Senate introduced measures that would forbid any federal court from relying on any law or precedent of any foreign adjudicator in interpreting the Constitution.[75] Steven Calabresi, a cofounder of the Federalist Society, is characteristically direct. "Those of us concerned about citation of foreign law . . believe in something called American exceptionalism, which holds that the United States is a beacon of liberty, democracy and equality of opportunity to the rest of the world," he writes. "The country that saved Europe from tyranny and destruction in the 20th century and that is now saving it again from the threat of terrorist extremism and Russian tyranny needs no lessons from the socialist constitutional courts of Europe on what liberty consists of."[76]

For all this chest-thumping, it is not clear that Americans identify much less with the international community than Europeans or others. Over a four-year period from 2005 to 2008, the World Values Survey asked respondents in forty-five countries whether and to what extent they "see [themselves] as a world citizen."[77] As Chart 5.4 indicates, only ten countries registered less agreement with that statement than the United States (69 percent), but eight of those ten were European countries: Bulgaria (46 percent), Georgia (48 percent), Germany (53 percent), Romania (54 percent), Ukraine (60 percent), Italy (62 percent), Moldova (65 percent), and Finland (65 percent). Including Turkey, nine European countries registered greater agreement with the sentiment of world citizenship than did the United States: Poland (74 percent), Cyprus (74 percent), Slovenia (74 percent), Switzerland (78 percent), Serbia (78 percent), Spain (79 percent), Sweden (84 percent), Turkey (85 percent), and Andorra (87 percent). If there is a leitmotif here, it is hardly obvious.

One's regard for international opinion may be unrelated to one's tolerance for hate speech. Or it may be that between-group differences between the United States and Europe record separate phenomena than within-group differences between the United States of 1997 and the United States of 2009. It may be that, as with

Lawrence v. Texas, 539 U.S. 558 (2003).

[73] *See id.* at 576 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 52 (1981), P.G. & J.H. v. United Kingdom, App. No. 00044787/98, 56 (Eur. Ct. H.R., Sept. 25, 2001); Modinos v. Cyprus, 259 Eur. Ct. H.R. (1993), Norris v. Ireland, 142 Eur. Ct. H.R. (1988); Brief of Mary Robinson et al. as Amic. Curiae at 11–12).

[74] *See* Dana Milbank, "And the Verdict on Justice Kennedy Is: Guilty," *Wash. Post*, Apr. 9, 2005, at A3; Constitution Restoration Act of 2004, S. 2323, H.R. 3799, 108th Cong., 2d Sess. (2004).

[76] Steven G. Calabresi, Letter to the Editor, *N.Y. Times*, Sept. 18, 2008, at A18.

World Values Survey 2005–2008.

CHART 5 4. Consider Self a World Citizen

overnment distrust, rising scorn for international opinion is a hurdle to Ameri-ans' tolerating hate-speech regulation but does not, without much more, explain merican attitudes. Additional data would help answer these important questions.

3. Opportunities for Exit

In his classic treatment of competition between firms or organizations, the economist Albert Hirschman counterposed two possible consumer or member responses to a decline in product or organizational quality. A person may stop buying the firm's products or leave the organization, that is, choose the "exit" option, or the person may complain to management, that is, choose the "voice" option.[78] Hirschman and others have usefully extrapolated his observations to the realms of political and social decision making. Referring to the country's origins as a settler nation, Hirschman writes that "[t]he United States owes its very existence and growth to millions of decisions favoring exit over voice."[79] The frontier, which then became the suburb and the exurb, has been a powerful symbol more available in the expansive United States than in the traditionally denser populations of Europe. Hirschman writes:

> Even after the closing of the frontier, the very vastness of the country combined with easy transportation make it far more possible for Americans than for most other people to think about solving their problems through "physical flight" than either through resignation or through ameliorating and fighting *in situ* the particular conditions into which one has been "thrown."[80]

Hirschman suggests that Americans are more apt than Europeans to vote with their feet rather than to engage in a contest of words or ideas.

This contestable macro account of social behavior and of American psychology, if true, should be of great interest to the discourse on hate-speech regulation. If material conditions or social expectations require that voice is preferred to exit, then a people may well be inclined to call on the state to moderate the terms of discourse. If we must stand and fight, let us at least be civilized about it. Whether or not the macro account is true, however, Hirschman's theoretical insight still offers lessons at the micro level. There is plenty of reason to believe that a permissive norm toward hate speech is likely to flourish where various forms of exit are readily available. As I have suggested, the American suburb was the twentieth century embodiment of exit.[81] And to the extent we seek an account that tells us what happened to hate-speech regulation circa 1952, it is tempting to ascribe a role to the rapid, subsidized

[78] Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 4 (Harvard University Press 1970).

[79] *Id* at 106

[80] *Id* at 107.

[81] Although this might be changing. *See* Nicole Stelle Garnett, "Suburbs as Exit, Suburbs as Entrance," 106 *Mich. L. Rev.* 277 (2007)

suburbanization of the United States. The pushback in the form of college speech codes then provides a compelling counterpoint, wherein the gates of universit campuses become a powerful metaphor for the absence of exit, the classroom a stylized arena for voice.

This story may also be helpful in explaining the more recent surge in American tolerance for offensive speech. Although U.S. growth in metropolitan areas in recent years has exceeded that outside of such areas since 2000, the growth rate of outlying counties within metropolitan areas grew 67 percent faster than central counties from 2000 to 2007.[82] Moreover, a greater proportion of U.S. population growth from 200 to 2004 resulted from domestic migration (as opposed to immigration or natural growth) than in the 1990s.[83]

Geography is not the only space across which individuals seeking to escape unwanted intimacy either isolate themselves or form communities of interest A Robert Putnam has famously detailed, traditional forms of civic engagement have vanished from the American social landscape in recent decades.[84] Others have replaced them – Facebook, Twitter, and MySpace, to name three – but the communities these exponentially multiplying forms of social networking create are voluntary associations devoted to predetermined common interests. They are designed, almost willfully, to defeat the need for the face-to-face interactions characteristic of voice-based communities. Rather, like suburbs, they permit socialization and exit to coexist.[85]

The viral proliferation of such communities over the past several years is self evident. For those still in need of convincing, consider that as of December 2008, 35 percent of American adults had a profile on a social networking site, and one in five used such sites on any given day. In February 2005, less than four years earlier, those numbers were, respectively, 8 percent and one in fifty.[86] It is also self-evident, I think, that, as P. M. Forni writes, "online communication has unleashed a new magnitude of rudeness."[87] Online discourse promises not only anonymity but minimal barriers to community entry and exit, with predictable results. First, individuals may feel more liberated to engage in offensive speech and therefore become acculturated to even solicitous of, uncivil discourse. Second, and relatedly, our default conception of the public sphere might gradually shift from the physical to the cyber world.

[82] U.S. Census Bureau, *Population Change in Central and Outlying Counties of Metropolitan Statistical Areas, 2000 to 2007* (2009).

[83] U.S. Census Bureau, *Domestic Net Migration in the United States: 2000–2004* (2006).

[84] Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster 2000).

[85] *See The Internet in Public Life* 90–1 (Verna V. Gehring ed., Rowman & Littlefield 2004); *cf.* Laura E. Buffardi and W. Keith Campbell, "Narcissism and Social Networking Web Sites," 34 *Personality & Social Psychol. Bull.* 1303 (2008).

[86] *See* Pew Internet & American Life Project, *Adults and Social Network Websites* 3–4 (2009).

[87] Pier M. Forni, *The Civility Solution: What To Do When People Are Rude* 149 (St. Martin's Griffin 2008).

asked whether racially offensive speech should be permitted "in public," we might understand the metes and bounds of that "location" – and therefore its rules of discourse – far differently than our children do.

If this explanation is valid and adequate, we might expect a like dynamic elsewhere in the world. Online communication is not unique to the United States, nor should we imagine it to be uniquely effective at altering *American* norms of civility. It may be that similar forces are at play in Europe and elsewhere; we lack the data to assess changes over time in world attitudes toward hate-speech restrictions. It may also be, however, that the Supreme Court's First Amendment decisions over the last decades, and the social and political movements that inspired them, helped create the space within which a norm of hate-speech tolerance can flourish.[88] This story again suggests the possibility that one or the other – the effects of online discourse or the Court's handiwork – is necessary but not sufficient to produce the American attitude on hate-speech regulation.

III

That attitude is influenced by an additional consideration that will be crucial to any efforts at reform. Lawmaking in the United States is not, of course, the exclusive province of the national government. Rather, the great majority of laws, ordinances, and regulations occur at the state and local levels. Any constitutional change requires a mixture of movement energy and cultural change, but federalism is the straw that stirs the drink. And in most cases it stirs ever so slowly. Whereas the Supreme Court may invalidate a law with the requisite five signatures, making the free-speech norm less permissive of offensive speech would require state-by-state action slow enough to delay premature Supreme Court review but massive enough to push national public opinion.

Political scientists have long questioned the notion, popularized by Eugene Rostow and Alexander Bickel, that the Supreme Court is an effective educative body. *See* Eugene V. Rostow, "The Democratic Character of Judicial Review," 66 *Harv. L. Rev.* 193, 208 (1952) (calling the Justices "teachers in a vital national seminar"); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 26 (Yale University Press 1962) (calling the courts "a great and highly effective educational institution"). The principal objection is that the public is generally ignorant of a large majority of the Court's business. *See, e.g.*, Walter F. Murphy and Joseph Tanenhaus, "Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes," 2 *Law & Soc'y Rev.* 357 (1968); Stephen M. Griffin, "What Is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition," 62 *S. Calif. L. Rev.* 493, 522 (1989) ("In the absence of adequate public knowledge about its activities, the Court cannot be said to educate or to have the power to legitimize government policies."). *But see* James L. Gibson and Gregory A. Caldeira, "Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court," 71 *Journal of Politics* 429 (2009). Even accepting low levels of public knowledge of the Court's ordinary workload, it is difficult to dispute the Court's role in reinforcing, if not creating, thick constitutional norms. *See* Robert Post and Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy," 92 *Calif. L. Rev.* 1027, 1038 (2004).

Thus, when a wave of anti-Nazi laws was sweeping across Europe in the 1930s, the only race-hate law the United States could muster during the period at the state level was New Jersey's law of 1935. Massachusetts and Indiana passed group libel laws in the 1940s, but the rest of the states were silent.[89] Congress was constitutionally forbidden from enacting a general race-hate law without a commerce hook, and the bills that were proposed were blocked by veto gates. The presence of multiple fora for lawmaking tends to disperse the energies of a popular movement. It also enables time for reflection and evaluation of the effectiveness of measures in sister jurisdictions. The feebleness of the National Socialist Party of America march in Chicago's Marquette Park – where the neo-Nazi group relocated from Skokie in 1978 – was a national object lesson in the efficacy of the American position. Hate speech can be remarkably self-refuting.

This chapter's aim, then, has not been to suggest an easy time for reformers. Rather, it has been to suggest, in Barry Friedman's delightful phrase, the importance of being positive.[90] American public opinion on hate-speech regulation appears to have trended dramatically in one direction over the last several years. That trend may be reversible through directed action. If my hypotheses as to causes are correct, then it will be useful to promote the effectiveness of government regulation and international institutions more generally. Perhaps, as Putnam argues, civics education, a renewed focus on public service, and innovations in urban planning can alter Americans' conception of community and encourage us to internalize a sense of mutual obligation.[91]

This will all sound Pollyanna ish to some, but public opinion offers lessons even for cynics. I have several times referred to the conditions that foster a norm for or against hate-speech regulation as potentially exogenous. It may be that those conditions resist directed action, or else are too complex to alter proactively. Even so, it is useful for reformers to have the tools to recognize the moment to strike. If Americans have a low opinion of government and international institutions, and are becoming increasingly insular and self-regarding in our social relations, it is anything but an obvious opportunity to import new, heretofore unconstitutional restrictions on offensive speech. More modest proposals – changes in the definition of hate crime or workplace harassment, for example – are better uses of reformers' energies.[92] In this regard, federalism may act as both sickness and cure. The opportunity for localized experimentation means that constitutional norms may be chipped at rather than detonated.

[89] Walker, *supra* note 9, at 82–3.

[90] Barry Friedman, "The Importance of Being Positive: The Nature and Function of Judicial Review," 72 *U. Cincinnati L. Rev.* 1257 (2004).

[91] Putnam, *supra* note 84, at 404–8.

[92] *See, e.g.*, H.R. 1913, 111th Cong., 1st Sess. (proposing to add sexual orientation-motivated violence to the federal hate crimes law).

My hypotheses as to causes are defeasible. But they must be evaluated both theoretically and empirically and, if necessary, supplemented or replaced. The posture I wish to discourage is the one that views the differences between the United States and much of the democratized world on hate-speech regulation as engrained, inalterably, within our cultural DNA. It may be true that Americans have certain instincts that predispose us to oppose content-based restrictions on speech. We are typically suspicious of government, fond of our own perceived exceptionalism, and able and willing to migrate, both physically and psychosocially. But to speak of genetic predisposition as destiny is a too-common fallacy. "[E]ven when a trait has been built and set, environmental intervention may still modify inherited defects," writes Stephen Jay Gould. "Millions of Americans see normally through lenses that correct innate deficiencies of vision."[93] Adjusting the American – or, if one prefers, the European – attitude toward hate speech calls for neither philosophizing nor despair, but rather careful surgery.

[93] Stephen Jay Gould, *The Mismeasure of Man* 186 (W.W. Norton 1996).

8

Denying Experience

Holocaust Denial and the Free-Speech Theory of the State

Julie C. Suk

American constitutional law is exceptionally protective of racist speech. Racist speech is criminally punishable in many western democracies,[1] even though these countries' laws also protect the freedom of expression. Furthermore, many European countries punish Holocaust denial,[2] based on the understanding that it is a form of racist, anti-Semitic propaganda. In the United States, however, racist speech is protected by the First Amendment's free-speech guarantee. To the American legal mind, the punishment of Holocaust denial would not even constitute a hard case: such a prohibition would be a paradigmatic violation of the First Amendment's free-speech guarantee.[3]

[1] For an extensive account of the prohibitions of hate speech and their application in Canada and various European countries, see Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," Chapter 13 herein.

[2] Holocaust denial is criminally punishable in France, Germany, Austria, Belgium, Spain, Portugal, Poland, Italy, and Switzerland. Until recently, Hungary had not prohibited Holocaust denial, an approach consistent with the Constitutional Court's generally protective stance toward speech. *See* Peter Molnar, "Towards Improved Law and Policy on 'Hate Speech' – The 'Clear and Present Danger' Test in Hungary," in *Extreme Speech and Democracy* 237 (Ivan Hare and James Weinstein eds., Oxford University Press 2009). In 2010, however, Hungary too made Holocaust denial a criminal offense.

[3] As Frederick Schauer puts it:

> It is not only that Holocaust denial is legally permitted and constitutionally protected in the United States. It is that the legal and constitutional permissibility of Holocaust denial is understood as a core and not merely a fringe application of the very idea of freedom of speech under the First Amendment.

Frederick Schauer, "Social Epistemology, Holocaust Denial, and the Post-Millian Calculus," Chapter 7 herein.

Thanks to Youngjae Lee, Peter Molnar, Robert Post, and an anonymous reviewer for Cambridge University Press for helpful comments on earlier drafts, and to Henry Rousso for fascinating discussions of the topics discussed in this chapter. The author is grateful to the participants in the hate speech conferences at Cardozo Law School in November 2005 and Central European University in March 2006 for their reactions and criticisms. Translations, unless otherwise indicated, are my own.

A close engagement with the foreign practice of prohibiting Holocaust denial can shed light on the normative and descriptive propositions underlying our protection of racist speech. In contrasting American racist-speech doctrine with the French experience of prohibiting and punishing Holocaust denial, this chapter compares the two legal cultures' different understandings of the processes by which a democratic state legitimates its authority to govern a society in which racial minorities are now equal citizens. These divergent accounts of democratic legitimacy have implications for the manner in which the legal system pursues racial equality.

American First Amendment cases addressing racist speech rest not on an individual right to express hatred, but rather on a particular theory of the state.[4] The Supreme Court has held that even though the First Amendment does not protect "fighting words," it nonetheless prohibits the state from singling out *racist* fighting words for punishment.[5] The primary concern in racist-speech doctrine is not the speaker's autonomy, or even the contribution of racist speech to the marketplace of ideas. Rather, it is that the state would be undermining its own democratic legitimacy were it to discriminate against certain viewpoints. According to this theory, the state cannot maintain its democratic legitimacy if it "cuts off any citizen from the possibility of participating in collective self-determination."[6] It cannot cut off racists and Holocaust deniers from the opportunity to influence democratic will formation.

In France, by criminalizing Holocaust denial, the state makes clear that racism has no place in collective self-determination. This exclusion enhances, rather than undermines, the state's legitimacy, because the state cannot govern legitimately unless it makes a strong, clear break with a past racist regime. The law against Holocaust denial participates in this legitimating rupture. To explore this process of legitimation, I examine the historical dynamics that led to the reestablishment of the French republic following World War II and the defeat of the Vichy regime. Laws prohibiting racist speech and Holocaust denial do not play the same role in every society, but in France, the law participates in the society's self-conscious construction of its own past. The history and genealogy of the current laws prohibiting racist speech and Holocaust denial show how significant these laws are to the legitimacy of the current republic.

[4] The Supreme Court has been generally hostile to content-based regulation of speech. Geoffrey Stone has identified four underlying concerns for this hostility: equality, communicative impact, distortion of the public debate, and motivation. *See* Geoffrey Stone, "Content Regulation and the First Amendment," 25 *Wm. & Mary L. Rev.* 189, 201–33 (1983). On close examination, all four of these underlying concerns are premised on the assumption that the state should be neutral, antipaternalistic, facilitating of impartial and unbiased public debate, and tolerant of ideas of which it disapproves. *See id.* at 203, 212–14, 225–6, 229.

[5] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391–2 (1992).

[6] Robert C. Post, "Community and the First Amendment," 29 *Ariz. St. L.J.* 473, 481 (1997). A similar argument is made by Ronald Dworkin. *See* Ronald Dworkin, "Foreword," in *Extreme Speech and Democracy*, *supra* note 2, at v–ix.

Comparative engagement with the French experience can lead to sharper articulations of the explanations for America's distinctive commitment to protecting racist speech. Why does the American state's legitimacy depend on the opportunity of all communities, including racist ones, to participate in collective self-determination? How does our current legal order understand the significance of the state's past participation in perpetuating racism? And what are the consequences of our approach for the ways in which our law pursues racial equality?

I. THE FREE-SPEECH THEORY OF THE STATE

I shall begin by articulating the theory of state legitimacy that underlies our racist-speech doctrine. In *R.A.V. v. City of St. Paul*, the Supreme Court struck down on First Amendment grounds a criminal ordinance prohibiting "the display of a symbol which one knows or has reason to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender."[7] The case grew out of the prosecution of several teenagers who burned a cross inside a fenced yard belonging to a black family.

The Court's reasoning is ultimately that the state cannot limit the speech of those expressing racial hatred while permitting other hateful messages:

> Displays containing some words – odious racial epithets, for example – would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender – aspersions upon a person's mother, for example – would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." *St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.*[8]

Even when messages are expressed through forms of expression not otherwise protected under free speech doctrine, the state must refrain from expressing special hostility to racist fighting words. The First Amendment prevents the state from proscribing some fighting words and not others, based on content: "The government may not regulate use based on hostility – or favoritism – towards the underlying message expressed."[9]

According to this theory, what is wrong with the St. Paul ordinance is not that it bans too much speech, but that it bans too little. Under this analysis, a blanket ban on all fighting words would be constitutionally permissible, because nobody

[7] *See R.A.V.*, 505 U.S. at 381.
[8] *Id.* at 391–2 (emphasis added).
[9] *Id.* at 386.

has a First Amendment right to express fighting words, but a narrower ban on racist fighting words is unconstitutional because it reflects state favoritism toward antiracist or antisexist points of view. What renders the law illegitimate is the state's hostility to a particular viewpoint, not the burdens on the individual autonomy interests in speaking. In public discourse, the state compromises its legitimacy by taking sides against racists, because it implies that democratic deliberation is not open to all. This message can undermine the state's legitimacy in a pluralistic society, in which the state is supposed to be open to all of its citizens.

This vision of the state is perpetuated in the more recent case of *Virginia v. Black*.[10] There the Court upheld the criminal punishment of cross burning with intent to intimidate, but it did so precisely because the statute in question prohibited *all* cross burnings with such intent, without singling out racist cross burnings in particular. Unlike the St. Paul ordinance at issue in *R.A.V.*, the Virginia statute made no reference to race, religion, gender, or other demographic characteristics:

> It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities.[11]

As *R.A.V.* made clear, if the Virginia statute had only banned cross burnings intended to express racial hatred, it would have been unconstitutional.

Recent American hate speech jurisprudence justifies the protection of racist speech based on its understanding of the bounds of legitimate state authority. As the *R.A.V.* Court put it, "In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids."[12] A state undermines its own legitimacy by favoring antiracist viewpoints over racist ones through the regulation of speech. Antiracist viewpoints are characterized as "majority preferences," and "the point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[13] Curiously, our constitutional law has not taken this rhetoric to its logical conclusion by prohibiting the state from enacting employment discrimination laws that may express the state's hostility to racism. But the *R.A.V.* Court is articulating a sentiment that has powerful resonance in our legal and political culture: The state's disapproval of racism can alienate people who remain equal participants in the democratic polity, and in so doing, compromises the state's legitimate authority

[10] Virginia v. Black, 538 U.S. 343 (2003).
[11] *Id.* at 362.
[12] *R.A.V.*, 505 U.S. at 396.
[13] *Id.* at 392

to govern us all.[14] That idea is the focus of this chapter, namely a theory of state legitimacy that extends beyond free-speech doctrine and affects other state pursuit of racial equality.

Robert Post has interpreted American First Amendment doctrine through the concept of democratic legitimacy: "[T]he American First Amendment tends to regard speech necessary for the maintenance of democratic legitimacy, which I shall call 'public discourse,' as a unique domain in which the state is constitutionally prohibited from enforcing community norms."[15] In the United States, "public discourse is an arena of competition of many distinct communities, each trying to capture the law to impose its own particular norms."[16] In this "marketplace of communities," the state's legitimacy depends on its refraining from the punishment of a community's attempts to shape collective self-determination through public discourse.

II. CRIMINAL PUNISHMENT OF RACIST SPEECH AND HOLOCAUST DENIAL IN FRANCE

The significance of this particular vision of democratic legitimacy can be illuminated by close engagement with an alternative model. In France, the state's legitimacy is not undermined by its prohibition of racist speech and Holocaust denial. In fact, I shall argue that, as a result of the complex historical trajectory of the Holocaust denial laws, the state's legitimacy appears to *depend* on its punishment of Holocaust denial rather than its protection of such speech.

Criminal law is not merely a mode of regulation or a means of deterring undesirable behaviors. Criminal law can uniquely enshrine a community's constitution of itself as a moral entity. It imposes responsibilities on the members of a particular community, responsibilities that must be discharged as a condition of their remaining members of the community. As Joel Feinberg explained, criminal law has the capacity not only to condemn, but to authoritatively disavow certain acts.[17]

France's criminal punishment of Holocaust denial takes on a largely expressive rather than regulatory function. The very purpose of French laws prohibiting racist speech and Holocaust denial is to take a strong expressive stance of hostility toward the viewpoints expressed. Any equivalent statute would be a paradigmatic violation of the American free-speech theory of the state. Furthermore, the French state's punishment of Holocaust denial functions more in this expressive capacity than as

[14] As I note in Section IV, antidiscrimination law has always been understood to include claims of "reverse" discrimination, that is, claims by whites challenging affirmative action or other initiatives to promote the equality of racial minorities by addressing the presence of effects of past racism. Thus, antidiscrimination law does not clearly express a message condemning racism, and this may be an important element in maintaining its legitimacy in our legal culture.

[15] *See* Robert Post, "Hate Speech," in *Extreme Speech and Democracy*, *supra* note 2, at 123, 133.

[16] *Id. See also* "Interview with Robert Post," Chapter 1 herein.

[17] Joel Feinberg, "The Expressive Function of Punishment," in *Doing and Deserving: Essays in the Theory of Responsibility* 95, 101–2 (Princeton University Press 1970).

a means of minimizing the availability of racist speech or Holocaust denial to the public's eyes and ears.

In France, as in Germany and other European nations, criminal law has played a critical role in enabling the state and the society to face their collective responsibility for the Holocaust. The criminal process can be described as a "realm of memory,"[18] through which the nation collectively remembers the historical circumstances that engendered its current constitutional commitments. In France, a generation after World War II, there were several highly publicized criminal trials of Vichy and Nazi officials for their crimes against humanity during the Holocaust, the most famous ones being the trials of Klaus Barbie and Paul Touvier.[19] The memory of Vichy has been a central theme, if not an obsession, in French public discourse since the 1970s,[20] when new historical research[21] and films[22] established and exposed the shared responsibility of the French state for the Holocaust.

The social function of criminal punishment in France in general is somewhat different from that in the United States. French law tends to criminalize acts that are only subject to civil liability in the United States.[23] There are several gradations of crimes: "contravention," "délit," and "crime." Holocaust denial is a *délit*. Criminal punishments in France are mild compared to those in the United States, and for *délits*, imprisonment is rarely imposed; the punishment is usually a fine.[24] But the difference between a criminal fine and a civil remedy is that criminal punishment enables the state to express condemnation unambiguously.

The criminal provisions punishing racist speech are found in the 1972 law "relative to the fight against racism." The 1972 statute amended an existing statute on the "freedom of the press," which had been in force since 1881.[25] The 1972 amendment added the following provision to the "freedom of the press" statute

[18] Here I borrow Pierre Nora's terminology, in French, "les lieux de mémoire." *See Realms of Memory: The Construction of the French Past* (Pierre Nora & Lawrence D. Kritzman eds., Arthur Goldhammer trans., Columbia University Press 1998) (vol. 3, "Symbols"), *see also Rethinking France: Les Lieux de Mémoire* (Pierre Nora ed., David P. Jordan trans., University of Chicago Press 2010) (vol. 4, "Histories and Memories").

[19] For an account of these trials, see Henry Rousso, *The Haunting Past* (Ralph Stoolcraft trans., University of Pennsylvania Press 2002); Eric Conan and Henry Rousso, *Vichy, An Ever-Present Past* (Nathan Bracher trans., Dartmouth College/University Press of New England 1998).

[20] *See* Henry Rousso, *The Vichy Syndrome: History and Memory in France since 1944* (Arthur Goldhammer trans., Harvard University Press 1994) (1991).

[21] *See, e.g.*, Robert Paxton, *Vichy France: Old Guard and New Order 1940–1944* (Columbia University Press 2001) (1972).

[22] *See, e.g.*, *The Sorrow and the Pity* (Marcel Ophüls 1970).

[23] To name just a few examples, employment discrimination, sexual harassment, and defamation are all prohibited by the Penal Code. *See* Code pénal [C. pén.] art. 225–2, 222–33, 226–8 (Fr.).

[24] *See* James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* 83 (Oxford University Press 2003).

[25] *See* Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 29, 1881 on the Freedom of the Press], J.O.R.F., July 30, 1881.

> Whoever, by means described in article 23, will have provoked to discrimination, hatred, or violence with regard to a person or a group of persons by reason of their origin or their membership or non-membership to an ethnicity, a nation, a race, or religion, shall be punished by imprisonment of one month to one year or a fine of 2,000 Francs to 300,000 francs or only one of these punishments [26]

Article 23 of the Freedom of the Press statute refers to writings, prints, drawings, engravings, paintings, emblems, or images, any other support of writing, speech, or images sold and distributed, put up for sale or exposed in public places, whether by signs exposed to the public or any audiovisual communication.[27] Thus, it appears that the 1972 law banned most forms of public expression with racist content because all such materials could provoke discrimination, hatred, or violence on the basis of race.

In addition to its speech provisions, the 1972 statute made it a criminal offense to discriminate on the basis of race in certain contexts.[28] The law criminalized the refusal to provide a good or service, interference with the normal exercise of economic activity, refusal to hire, firing or sanctioning, the denial of offers of employment or employment training, and refusal of access to internships on the basis of race.[29] Unlike the United States, which only imposes civil liability for these types of discrimination, France imposes criminal punishment as well as civil liability for intentional racial discrimination.[30] Although the statute authorizes up to three years' imprisonment for racial discrimination, prison sentences in discrimination cases have always been suspended when they are imposed.[31] The usual punishment for racial discrimination is a criminal fine, often in an amount equivalent or lower than the damages awards often awarded in American civil employment discrimination suits.[32]

Holocaust denial was explicitly banned in 1990, in a law explicitly aimed at "repressing all racist, anti Semitic, or xenophobic acts."[33] Known as the "loi Gayssot," the statute criminalized Holocaust denial by prohibiting the public contestation of "the existence of 'crimes against humanity.'" It defined "crimes against humanity"

[26] Loi 72–546 du 1 juillet 1972 relative à la lutte contre le racisme [Law 72–546 of July 1, 1972 on the fight against racism], J O R F , July 2, 1972, at 6803 Note that, under the current version of the statute, the maximum fine is €45,000 and one year of imprisonment.

[27] Loi du 29 juillet 1881 sur la liberté de la presse, *supra* note 25, art. 23

[28] Loi no. 72–546, *supra* note 26, tit II, art. 6–8

[29] *Id. See also* C pén. art 225 1; 225–2 (Fr.).

[30] For a discussion of the procedural and institutional explanations for France's continued use of criminal law to enforce employment discrimination law, see Julie C Suk, "Procedural Path Dependence: Discrimination and the Civil-Criminal Divide," 85 *Wash. U.L. Rev.* 1325 (2008).

[31] For a discussion of convictions under the racial discrimination provisions of the 1972 statute, *see id* at 1340–5

[32] *See id* at 1365.

[33] Loi 90–615 du 13 juillet 1990 tendant à réprimer tout acte raciste, anti-Semite, ou xenophobe, art. 9 [Law 90–615 of July 13, 1990 on repressing all racist, anti-Semitic, or xenophobic acts, art. 9], J.O.R.F , July 14, 1990, at 8333

according to article 6 of the statute of the international military tribunal annexed to the treaty of London of August 8, 1945.[34] The statute also reaffirmed the principle prohibiting any discrimination based on membership or nonmembership to an ethnicity, nation, race, or religion.[35] In addition, the statute empowered antiracist associations and organizations devoted to defending the honor of the Resistance to initiate and participate in proceedings prosecuting the denial of crimes against humanity.[36]

In practice, investigations and prosecutions under the laws prohibiting racist speech and Holocaust denial are few and far between. Most of them are initiated by antiracist groups against academics and politicians who are already well known for their racist or revisionist views. Many of the defendants are repeat offenders. As is the case with criminal racial discrimination offenders, Holocaust deniers rarely serve prison sentences. When imposed, prison sentences are usually suspended. The usual punishment is a criminal fine. In many cases, the fine, too, is suspended. Despite convictions and criminal fines for incitement to racial hatred and Holocaust denial, convicted Holocaust deniers continue to publicly avow their views. All of the Holocaust denial literature for which these offenders are punished is available for perusal in French libraries. These realities support the conclusion that the main function of criminalizing Holocaust denial is to strongly express the state's moral outrage rather than to silence an unpopular viewpoint.

There have been several well publicized prosecutions of Holocaust deniers in the last two decades. The first highly publicized conviction under the 1990 Gayssot law occurred in 1991, when Robert Faurisson, a well-known Holocaust denier, was convicted for stating in a magazine interview that the "the myth of the gas chambers is a dishonest fabrication," and that he had "excellent reasons not to believe that there was a policy of exterminating the Jews, or in the magic of gas chambers "[37] Faurisson's prosecution was initiated by eleven associations of French resistance fighters and deportees to German concentration camps. He was sentenced to a 100,000 FF fine The editor of the magazine was sentenced to a 30,000 FF fine and ordered to pay 20,000 FF to each of the eleven associations that had participated in the proceedings. Another important provision of the criminal judgment was that the judgment had to be published in advertisements in four daily publications, costing 15,000 FF for each publication. Faurisson's criminal fine was suspended, meaning that he would only have to pay it if he committed the same offense within five years

[34] Loi du 29 juillet 1881 sur la liberté de la presse, *supra* note 25, art 24, Law No 90–615, *supra* note 33, art. 9.

[35] Loi no 72–546, *supra* note 33, art 1

[36] Loi 90–615, *supra* note 33, art. 13. Note that art. 2 1 of the *Code de la procédure pénale* authorizes antiracist organizations to participate as civil parties in prosecutions of racial discrimination in violation of the *Code pénal* art 225–2, which codified the antidiscrimination provision of the 1972 statute.

[37] "Pour 'contestation de crimes contre l'humanité' M. Robert Faurisson est condamné à 100 000 francs d'amende avec sursis," *Le Monde* (Fr), Apr 20, 1991

of the sentence.[38] Faurisson then unsuccessfully challenged his conviction and the 1990 Gayssot law, on freedom-of-expression grounds, before the United Nations Committee on the International Covenant on Civil and Political Rights.[39]

Nonetheless, Faurisson persisted in publicizing his views that there were no gas chambers to execute the Jews. He was convicted five times between 1992 and 1996 for Holocaust denial.[40] In 2005, he broadcast this view on an Iranian satellite television channel, stating: "There never existed a single gas chamber for execution by the Germans, not one. As a consequence, the gas chamber that millions of tourists visit at Auschwitz, that's a lie, a falsification, a trick for tourists." For these statements he was convicted again under the Gayssot law, fined €7,500, and sentenced to a suspended prison sentence of three months.[41] The prosecution was initiated by MRAP (Mouvement contre le racisme et pour l'amitié entre les peoples) (Movement against racism and for friendship between peoples) and LICRA (Ligue contre le racisme et l'antisémitisme) (League against racism and anti Semitism), two of the antiracist organizations that had participated in the first case in 1991.

Throughout the last two decades, these associations have initiated several more prosecutions of well-known Holocaust deniers. In 1998, Roger Garaudy, a philosopher and author, was prosecuted for expressing doubt about the existence of the gas chambers in his 1995 book, *Les mythes fondateurs de la politique israélienne* (*The founding myths of Israeli politics*).[42] In several passages, he referred to the "myth" of six million exterminated Jews, of justice at Nuremberg, and of the Holocaust.[43] Garaudy was convicted and fined 120,000 FF. Damages were also awarded, largely as a symbolic measure, to MRAP and LICRA, which had participated in the litigation.

The following year, LICRA and other organizations initiated the prosecution of Jean Plantin for publishing the journal *Akribeia*, devoted to questioning the extermination of Jews in gas chambers in Nazi concentration camps. Plantin received a criminal fine of 10,000 FF and a suspended six-month prison sentence.[45] Plantin became the first Holocaust denier whose suspended sentence was converted into a

[38] *Id*

[39] Faurisson v. France, UNHRC Comm. No. 50/1993, U.N. Doc. CCPR/C/58/D/550/1993, decided Nov. 8, 1996.

[40] "Le négationniste Robert Faurisson a été condamné à trois mois de prison avec sursis," *Le Monde* (Fr.), Oct. 3, 2006.

[41] *Id*

[42] Roger Garaudy, *Les mythes fondateurs de la politique israélienne [The Founding Myths of Israeli Politics]* (1995). Note that Garaudy's book is available for perusal in several French libraries. For instance, at the Bibliothèque Nationale de France, it is available under the call number Tolb.ac Rez-de-jardin magasin 1999-190038; at the Sciences-Po library, it is available under the call number 8°182.236.

[43] "Roger Garaudy 'doute' toujours de l'existence des chambres à gaz," *Le Monde* (Fr.), Jan. 11, 1998.

[44] "Le philosophe Roger Garaudy est condamné pour contestation de crimes contre l'humanité," *Le Monde* (Fr.), Mar. 3, 1998.

[45] "Un éditeur Lyonnais condamné pour 'publicité' en faveur d'oeuvres révisionnistes," *Le Monde* (Fr.), May 29, 1999.

actual sentence, when the Lyon Court of Appeal revoked the suspension after Plantin violated the terms of the suspension by publishing writings denying the Holocaust on an internet site.[46] However, the Cour de Cassation nullified the Court of Appeal's decision, reinstating the suspended sentence.[47]

Since then, a handful of Holocaust deniers have served actual prison sentences. In 2004, Vincent Reynouard was convicted under the 1990 statute for distributing a pamphlet and videocassette questioning the massacre of Jews in Oradour-sur-Glane in 1944.[48] Reynouard, who had been convicted previously in 1991 for distributing materials to high school students questioning the existence of the gas chambers, was sentenced to twenty-four months in prison, only eighteen of which were suspended. More recently, Georges Theil, a Front National politician who had served in the elected position of regional adviser in the Rhônes-Alpes region, was sentenced to six months in prison, unsuspended, for saying on local television that the existence of gas chambers was a physical and chemical impossibility.[49]

But these recent prison sentences do not necessarily signal a trend toward sending Holocaust deniers to jail. More recent convictions involved suspended prison sentences. Bruno Gollnisch, the second-in-command of the Front National, was convicted in January 2007 under the Holocaust denial statute for having stated in a press conference that there should be a debate about how the Jews died in Nazi camps. Gollnisch was fined €5,000 and then ordered to pay €55,000 in damages to the organizations that initiated his prosecution. He was given a suspended three-month prison sentence. Faurisson's October 2006 conviction also led to a suspended three-month sentence.

These examples illustrate the significance of the symbolic function of France's criminalization of Holocaust denial. The laws against racist speech do not censor racist or Holocaust denial literature. They do not prohibit anyone from perusing these materials. Indeed, all of the offending works, including Garaudy's book and Plantin's periodical, are freely available to readers in the Bibliothèque Nationale de France and other libraries. While the criminal prosecutions have resulted in fines, payment of damages to antiracist, resistance, and deportees' organizations, and publication of the judgment in newspaper advertisements, the judgments have not removed the voices of Holocaust deniers from public discourse. These prosecutions draw public attention to Holocaust denial rather than shielding the public from these viewpoints. Thus, the most important function of these laws in actual operation is not censorship or suppression, but the state's strong expression of disapproval of the content of the message.

[46] *See* "Le négationniste Jean Plantin condamné à de la prison ferme," *Le Monde* (Fr.), Jan. 24, 2003.

[47] Cour de cassation [Cass.] [Supreme Court for Judicial Matters], Chambre criminelle [crim.] Apr. 27, 2004, 03-85288.

[48] "Oradour-sur-Glane: le révisionniste Reynouard condamné à six mois de prison ferme," *Le Monde* (Fr.), June 9, 2004.

[49] "Un ancien élu frontiste condamné à six mois de prison," *Le Monde* (Fr.), Jan. 5, 2006.

It is tempting to interpret this reality as an argument against the criminalization of Holocaust denial. Alan Dershowitz, for instance, has argued that criminalizing Holocaust denial is counterproductive and ineffective, as it helps spread rather than suppress the prohibited message.[50] Such arguments assume that the sole purpose of criminalizing Holocaust denial is to deter, suppress, and drive out such views from French society. This view fails to capture something far more significant that is going on: Each time the state prosecutes Holocaust denial, it reminds the French people that the Holocaust occurred, and this memory is essential to the legitimacy of its current political authority. Examining the legal history of prohibiting racist speech in France reveals the ways in which the current legal order is understood, by way of remembering the past, as a commitment to avoiding the past regime's failures.

III. A LEGAL HISTORY OF PROHIBITING RACIST SPEECH

In France, the state's ability to express hostility to anti-Semitism affirms, rather than undermines, the legitimacy of the current republic. This is largely due to the political and legal history of banning racist speech in France. The statute providing for the punishment of racism in its various manifestations was embedded in the legal processes by which the state dismantled the anti-Semitic Vichy regime and reestablished the republican constitutional order following World War II.

Unlike the U.S. constitution, the French constitution explicitly links the values it protects to the historical events that precipitated their proclamation. The constitution now in force was adopted in 1958. Although the 1958 constitution's main purpose was to restructure then existing political and legal institutions, it explicitly integrated two older texts: the 1789 Declaration of the Rights of Man, the founding document of the French Revolution, and the Preamble to the 1946 constitution, which enabled France to emerge from World War II as a constitutional republic.

The Holocaust is directly referenced, albeit in broad and general language, in the 1946 preamble, the first article of which reads:

> Following the victory won by free people over regimes that attempted to enslave and degrade the human person, the French people proclaim again that every human being, without distinction of race, religion, or belief, possesses inalienable and sacred rights. It solemnly reaffirms the rights and liberties of man and citizen consecrated by the Declaration of Rights of Man of 1789 and the fundamental principles recognized by the laws of the Republic.[51]

The language of the Preamble self-consciously characterizes the antiracist vision of human rights as something that is being proclaimed *again*. The constitutional order

[50] *See* Jamie Glazov, "Symposium: Criminalizing Holocaust Denial," *Front Page Magazine*, July 27, 2007, *available at* http://97.74.65.51/readArticle.aspx?ARTID=27525.

[51] 1946 Const. Preamble (Fr.)

that emerged after World War II was a "reaffirmation," a new regime that had to establish both a break with the Vichy regime that preceded it and continuity with the republic that preceded Vichy. The text framed the French people's commitment to human rights, particularly human rights regardless of race, religion, and faith, as importantly connected to a rejection by the French people of the Nazi regime that had just been defeated to make way for this constitutional moment. Establishing a break with the Nazi acts in recent memory was thus important to legitimizing the new constitutional order that emerged when the French people reconstituted the republican state.

Not only did the constitutional text of 1946 express condemnation of recent Nazi atrocities, the regime change itself, which transformed Nazi-dominated Vichy France into the liberated French Republic, included the restoration of a 1939 law prohibiting racist and anti-Semitic speech. The 1939 decree, known as the Marchandeau law, amended the 1881 Freedom of the Press law to prohibit "defamation and insults against a group of persons belonging by their origin to a particular race or religion, which have for their purpose to incite hatred against citizens or residents."[52] The report to the President justifying this decree noted that the law was part of a "vigorous effort at national defense," as hateful speech had the effect of dividing citizens and weakening the morale of the nation.[53] The purpose of the law, it appears, was not only to protect the victims of these insults, but, more importantly, to promote solidarity between French citizens of different races and religions.

The 1939 law was a reaction to the proliferation of anti-Semitic propaganda in the French press throughout the 1930s. Céline published his infamous *Bagatelles pour un massacre* in 1936; shortly before that, Marcel Jouhandeau had published *Le péril juif*. Céline's second anti-Semitic pamphlet, *L'Ecole des cadavres*, appeared in 1938. These pamphlets depicted Jews as a threat to French civilization. In the popular anti-Semitic literature of the period, the hatred of Jews was largely based on resentment of Jews' perceived economic success and intellectual stature. During the period leading up to the Vichy government's ascension to power, racism against Jews was largely manifested through the press. Unlike race discrimination in the American context, racism was not manifested in legal segregation leading to severe economic inequality. Racism was evident primarily in the expression of anti-Semitic ideas in writing, which contributed significantly to the success of the anti-Semitic politicians who established the Vichy regime. Political opposition to Léon Blum, the socialist prime minister, was often framed in anti-Semitic terms. The popular

[52] Décret modifiant les articles 32, 33, et 60 de la loi du 29 juillet 1881 sur la liberté de la presse, 21 avril 1939, [decree modifying articles 32, 33 and 60 of the law of July 29, 1881 on the Freedom of the Press, April 21, 1939], J.O.R.F., Apr. 25, 1939, at 5295.

[53] Rapport au président de la république française, 21 avril 1939, [Report to the President of the French Republic on Apr. 21, 1939], J.O R.F., Apr. 25, 1939, at 5295.

press depicted Jews as conspiring to take over France, repeating the themes of th popular 1886 book by Edouard Drumont, *La France juive*.[54]

The 1939 Marchandeau Law sought, unsuccessfully, to stop racism from destroying the French republic. The framers of the Marchandeau law explained why the thought the suppression of racist speech did not alter or conflict with the fundamental commitment to free speech:

> [The law] has no purpose other than to unite liberty [of the press] with others that are inseparable from the republican device itself. To this end, no reason related to race or religion can destroy the equality of citizens; no legacy born of hereditary circumstances could attack, in the way one sees another, the sentiment of fraternity which unifies all the members of the French family.[55]

The purpose of the law was not only to protect individuals subject to racist speech, but to reconceptualize the victim of racist speech as the republic itself, which could not survive if its citizens regarded each other through the lens of racism instead of the lens of fraternity. The goal was national solidarity. Racist speech harms "the sentiment of fraternity" that is necessary for the proper functioning of the republic. just as free speech is necessary for the proper functioning of the republic. Thus, because protection of the "republican device"[56] is the ultimate goal of freedom of speech, the framers of the Marchandeau law saw the punishment of racist speech as fully compatible with the values underlying freedom of speech.

Nonetheless, the anti-Semitic Vichy regime ascended to power on June 16, 1940. A few months later, the new government passed laws abridging the rights of Jews, thus destroying the republican commitment to equality. One of the first acts of the Vichy regime was to abrogate the Marchandeau law itself[57] and pardon everyone who had been convicted under it.[58] At the time, the popular view was that the Marchandeau law had established a special legal privilege for Jews[59] that was no longer compatible with the "new French state."[60] Thus, Vichy's abrogation of the Marchandeau law is now seen as the first legal step that the Vichy regime took in its persecution of Jews. Laws that explicitly stripped Jews of rights and privileges began to appear

[54] Edouard Drumont, *La France Juive* (1886) For an excellent and detailed account of anti-Semitic propaganda in the 1930s, and its role in the political evolution that led to Vichy's success, see Gérard Noriel, *Immigration, antisémitisme et racisme en France (XIXe-XXe siècle)* 433–81 (Fayard 2007)

[55] Rapport au président de la république française, *supra* note 53

[56] *Id.*

[57] Loi portant abrogation du décret-lo. du 21 avril 1939, modifiant les articles 32, 33, et 60 de la loi du 29 juillet 1881 sur la liberté de la presse, [Law repealing the decree law of April 21, 1939 modifying articles 32, 33, and 60 of the law of July 29, 1881 on the Freedom of the Press], J.O R.F, Aug. 30, 1940, at 4844.

[58] *See* Loi portant abrogation, *supra* note 57, art. 2.

[59] *See* Ralph Schor, *L'Antisémitisme en France dans l'entre-deux-guerres: Prelude à Vichy* 142–43 (Editions Complexe 2005).

[60] *See* Michael Marrus and Robert Paxton, *Vichy France and the Jews* 3 (Basic Books 1981).

in October and November of that year.[61] An early example was the abrogation of another important law dating back to 1870, known as the Cremieux decree, which had granted French citizenship to Jews in Algeria.[62] Many more laws followed, one at a time, denying Jews the opportunity to work in government, excluding them from various professions, one at a time, limiting their property rights, requiring their identification, and, ultimately, authorizing their deportation and extermination.[63]

When France was liberated from German occupation, the new regime issued an ordinance on August 9, 1944 that effectively declared all the legal acts of the Vichy regime to be null and void.[64] The French constitutional order of 1946 could only be established after Vichy's anti-Semitic laws had been dismantled. The 1944 ordinance declared: "The form of the Government of France is and remains a Republic. In law, it never ceased to exist."[65]

The ordinance nullified all the "constitutional, legislative, and regulatory acts" of the government after June 16, 1940. It explicitly nullified all acts "that established or applied a discrimination founded on Jewish characteristics."[66] For many other laws, however, the project of reestablishing the Republic was complicated. For one thing, the Resistance had also passed laws and decrees after June 1940 on behalf of "France Libre" (Free France) or "France combattante" (France at War), and the ordinance of August 9, 1944 did not intend to nullify these acts. Furthermore, the new regime wanted to restore some but not all aspects of the Third Republic that had fallen to Vichy. Thus, tables annexed to the ordinance specified the particular Vichy acts that were nullified, as well as the scope of the nullification. Laws on Tableau I were nullified with the effect of reverting back to the state of affairs prior to the adoption of the Vichy law in question.[67] Laws on Tableau II were nullified prospectively, and thus without undoing the effects of the law prior to passage of the August 9, 1944 ordinance.[68] Vichy's abrogation of the racist speech law was on Tableau I.

The current French statute criminalizing racist speech cannot be understood in isolation from the history by which the postwar French state established its break

[61] *See* Loi portant statut des juifs, 3 octobre 1940, [Act of Oct. 3, 1940 on the status of Jews], J O.R F , Oct. 18, 1940, at 5323. Loi portant réorganization des corps municipaux, 16 novembre 1940, [Law regarding the reorganization of municiple bodies, Nov. 16, 1940], J O R F , Dec 12, 1940, at 6074.

[62] Loi portant abrogation du décret du Gouvernement de la defense nationale du 24 octobre 1870 fixant le statut des juifs indigènes des département de l'Algérie, 7 octobre 1940, [Law repealing the decree of the Government of National Defense of Oct. 24, 1870 setting up the statute of the native Jews of the departments of Algeria, Oct. 7, 1940], J.O.R.F, Oct 8, 1940, at 5234

[63] *See generally* Richard Weisberg, *Vichy Law and the Holocaust in France* (Routledge 1996)

[64] Paxton, *supra* note 21, at 330

[65] Ordonnance du 9 août 1944 relative au rétablissement de la légalité républicaine sur le territoire continental, [Order relating to the restoration of republican legality on the continental territory, Aug 9, 1944], J.O R.F, Aug. 10, 1944, at 688

[66] *Id.* art. 3.

[67] *See id.* art. 4 & Tableau I, at 688–9

[68] *See id.* art 4 & Tableau II, at 688–9.

with Vichy, as well as its continuity with the republic that preceded Vichy.[69] Tracing the genealogy of the 1939 law reveals its embeddedness in the project of reclaiming antiracism as a republican value that had existed before and after Vichy

More importantly, the 1939 Marchandeau law continues to occupy a central place in contemporary French legal discourse around racism and discrimination The law was explicitly remembered as a critical element of the reconstitution of a legitimate republic when France adopted its modern antiracism laws in 1972 Legislators invoked the 1939 law and designated it as the legal template on which modern antiracism law, including the prohibition of discrimination, would be built When the 1972 law prohibiting incitement to racial hatred was being debated legislators discussed the memory of the Holocaust and framed the 1939 Marchandeau law as the foundation for the legislation they were proposing. Indeed, one member of the National Assembly reminded his colleagues of the Marchandeau decree's legal history: its abrogation by the Vichy regime and return into force when republican legality was reestablished.[70]

By invoking this history, the legislators in 1972 implicitly tied the antiracism law to the constitutional order established after the Vichy regime was dismantled When the 1990 law strengthening antidiscrimination law and prohibiting Holocaust denial was passed, legislators invoked the Marchandeau law again as the origin of "antiracist legislation."[71] Indeed, the memory of French anti-Semitism has influenced the contemporary legal understanding of racial equality in France today.[72]

The legitimacy of the postwar constitutional order depended on the state's vehement rejection, not only of anti-Semitism as an idea, but of anti-Semitism as a social movement. Anti-Semitism is characterized as harmful not only to Jews, but to national solidarity. This idea motivated the adoption of the 1939 law punishing racist speech, and it endured in the legislative debates leading to the adoption of the 1990 law explicitly banning Holocaust denial.[73] The 1990 "Gayssot" law presented itself as an extension of the 1972 law punishing incitement to racial hatred. The 1990 law

[69] Indeed, when De Gaulle was asked formally to proclaim the Republic on August 25, 1944, he replied: "The Republic has never ceased to exist. Free France, fighting France, the French Committee for National Liberation has always encompassed it. Vichy was always and remains null and void Myself, I am the president of the government of the Republic Why would I have to proclaim it?" *See* Henry Rousso, *Le syndrome de Vichy De 1944 à Nos Jours* 31 (1987).

[70] *See* Assemblée Nationale, Débats Parlementaires, 7 juin 1972, [National Assembly, Parliamentary Debate of June 7, 1972], J.O R.F , June 8, 1972, at 2282.

[71] See Assemblée Nationale, Débats Parlementaires, 2e séance du 2 mai 1990, [National Assembly, Parliamentary Debate meeting 2E of May 2, 1990], J.O.R.F , May 3, 1990, at 936 (remarks of Jacques Toubon)

[72] For a detailed discussion of the importance of the memory of Vichy for French antidiscrimination law, see Julie Chi-hye Suk, "Equal by Comparison Unsettling Assumptions of Antidiscrimination Law," 55 *Am J Comp. L.* 295, 314–24 (2007).

[73] *See* Assemblée Nationale, Débats Parlementaires, 2e séance du 2 mai 1990, [National Assembly, Parliamentary Debate meeting 2E of May 2, 1990], J O R F , May 3, 1990, at 919 (remarks of Jean-Claude Gayssot)

prohibited, *inter alia*, the denial of the "crimes against humanity" defined by article 6 of the international military tribunal statute attached to the Treaty of London The statute prohibiting Holocaust denial wrote into law the growing acknowledgment that the denial of the Holocaust was a new, more subtle manifestation of anti Semitism in French society.[74] Thus, the criminalization of Holocaust denial could easily be characterized as an extension of existing laws that already criminalized incitement to racial hatred and racial defamation.

At the same time, it was difficult to prosecute Holocaust denial under these existing laws, because the Holocaust deniers tend to use the legitimating posture of historical research to disguise their acts of racist propaganda.[75] Instead of making overt anti-Semitic statements of the sort that proliferated in the late 1930s, leading up to the passage of the Marchandeau law, today's anti-Semites invoke the objective academic discipline of history to assert that the Jews were not exterminated in gas chambers by Nazis. The subtle implication of such an assertion is that Jews fabricated the stories of their own persecution to mobilize the world's support for the creation of Israel [76] The image of Jews as lying to seize power is a familiar one the same image was perpetuated in anti-Semitic propaganda in the 1930s, culminating in Vichy France's persecution and deportation of French Jews.[77] As Michel Troper puts it, Holocaust denial "takes part in an anti-Semitic and anti-Democratic movement, which did not stop with the genocide itself, and which nourished it."[78] Troper, like many legislators who supported the 1990 Gayssot law, recognized that Holocaust denial is not merely the expression of a historical viewpoint, but a way of participating in the same social movement that destroyed the republic in the past.

France's antiracism laws punish the forms of racist propaganda that resemble those that facilitated the Vichy regime's ascent to power and the subsequent participation by the French state in the Holocaust. Today, the purpose is not necessarily to "regulate" such speech to avert a tangible danger of genocide, but to recognize the collective memory of racism's complex social manifestation and its potential to destroy the republic. This recognition is critical to the current republic's establishment of a clear break with the Vichy regime

[74] As the Justice Minister noted during the legislative debates, Holocaust denial was "the principal contemporary vector of antisemitism." *See* Assemblée Nationale, Débats Parlementaires, 2e séance du 2 mai 1990, [National Assembly, Parliamentary Debate meeting 2E of May 2, 1990], J O.R.F., May 3, 1990, at 905 This understanding was also articulated in Pierre Vidal-Naquet, *Les assassins de la mémoire* (Jeffrey Mehlman trans , Columbia University Press 1992) (1990).

[75] The Justice Minister noted that contemporary anti-Semites, aware of existing laws against racist speech, had begun to reframe their racist views as historical research *See* Débats Parlementaires, *supra* note 74. *See also* Michel Troper, "La loi Gayssot et la constitution," 54 *Annales, Histoire, Sciences Sociales* 1239 (1999).

Walter Laqueur gives a cogent account of how historical refutation of the so-called "Auschwitz lie" manifests anti-Semitism throughout Europe today. *See* Walter Laqueur, *The Changing Face of Anti Semitism. From Ancient Times to Today* 125–50 (Oxford University Press 2006).

See Schor, *supra* note 59, at 83–99

Troper, *supra* note 75, at 1255.

IV. RETHINKING THE FREE-SPEECH THEORY OF THE STATE

The comparison with France highlights several unique elements of the Amer[ican] First Amendment justification for protecting racist speech. Why is it that in [the] United States, the state's exclusion of racist speech from public discourse wo[uld] undermine its legitimacy instead of strengthening it? Robert Post notes that [in] effect, the First Amendment pressures the state to be neutral with respect to [the] many competing communities that seek to control the law by enforcing their [own] particular ways of distinguishing decency from indecency, critique from hatred. [In] America, unlike many other societies, recognizes the fact that it is made up [of] diverse communities, and thus our constitutional law is "concerned to protect pub[lic] discourse as a sphere that remains equally open to all communities."[80] This incl[udes] communities whose values contradict fundamental constitutional principles s[uch] as racial equality.

However, the idea that the diversity of America's communities requires F[irst] Amendment protection of racist speech is of relatively recent vintage. In fact, in [the] 1952 case of *Beauharnais v. Illinois*,[81] the Supreme Court suggested that the diver[sity] of America's communities justified state attempts to curb racist speech. In *Beauh[ar]nais*, the Supreme Court upheld the conviction of a man who had distribut[ed] leaflets accusing blacks of encroaching, harassing, invading, and mongrelizing [the] white race.[82] In so doing, the Court offered the following account of the stat[e's] legitimacy in prohibiting speech exposing any race to contempt:

> Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part.[83]

In footnotes, the Court documented the various race riots that had occurred around the time that the law was passed, as well as academic accounts of these riots. It continued:

> [T]he State was struggling to assimilate vast numbers of new inhabitants, as yet concentrated in discrete racial or national or religious groups – foreign born brought

[79] *See* Robert Post, "Hate Speech," *supra* note 15, at 133.
[80] *Id.*
[81] 343 U.S. 250 (1952).
[82] *Id.* at 252.
[83] *Id.* at 259.

[...]t by the crest of the great wave of immigration, and Negroes attracted by jobs in [...]r plants and the allurements of northern claims.[84]

[...] this account the state had a legitimate interest in promoting solidarity against [...]m in a diverse society by punishing racist speech. The Court was unwilling to [...]pel the state to ignore this history:

> In the face of this history and its frequent obligato of extreme racial and religious [...]ropaganda, we would deny experience to say that the Illinois legislature was without [...]ason in seeking ways to curb false or malicious defamation of racial and religious [...]roups. . . .[85]

Although *Beauharnais* has never been formally overruled, American First Amend[ment] doctrine has clearly moved away from this approach. This shift is accompanied [by] the Court's increased reluctance to distinguish decent from indecent, dangerous [from] unpopular, hatred from critique. This determined neutrality regarding differ[ent] substantive messages can appear extreme. For example, in *Brandenburg v. Ohio*, [which] invalidated the conviction of a Ku Klux Klan member advocating violence [against] blacks, Justice Douglas's concurrence analogized to punishing draft-card [burning] and the "infamous loyalty-security hearings" of the McCarthy era.[86] A cen[tral] feature of American diversity is that there is constant disagreement between [communities] about where the line between hatred and critique falls.

In the United States, the Constitution ensures that these communities – "we [the] people" – will remain sovereign regardless of what their values and political [commitments] become. In France, by contrast, the Republic remains sovereign, and [this] means that some values and political outcomes are not up for grabs. When [the] Second Empire fell and the Third Republic was established, it was forbidden [to] introduce or debate proposals in Parliament that would propose a return to the [monarchy.][87] Although the French constitution is much easier to amend than the [U.S.] constitution, it nevertheless declares that the republican form of government [can] never be subject to revision.[88] In the United States, what keeps the state legitimate [is] the constitution's guarantee of the sovereignty of the people, whereas in France, [the] state's legitimacy depends on its consistency with the republican values in the [constitution.]

The French experience draws attention to something that is entirely absent from the American legal culture: conscious attempts to forge a collective memory through law. In both the United States and France, the current constitutional orders emerged after the state participated in racist exclusions of persons whom they now embrace as

[84] *Id.*
[85] *Id.*
[86] Brandenburg v. Ohio, 395 U.S. 444, 457 (Douglas, J., concurring).
[87] *See* Patrick Weil, "The Politics of Memory: Bans and Commemorations," in *Extreme Speech and Democracy*, *supra* note 2, at 562, 570.
[88] 1958 Const. art. 89 (Fr.).

equal citizens In France, the state recognizes the Vichy regime's anti-Semitism and its participation in the Holocaust in various ways. One mundane example is that at a public preschool in the 15th arrondissement, a plaque prominently displayed above the main entrance invokes the memory of children who were deported from the school because they were Jewish, "with the active participation of the Vichy government." In addition, a law commemorates the state's participation in racist and anti-Semitic persecution. Passed two and a half years after the Loi Gayssot, a decree establishes July 16 as a national day of commemoration of the victims of racist and anti-Semitic persecution.[89] The date was chosen because it was the anniversary of the roundup of the Vélodrome d'hiver in 1942, when the French police arrested and eventually deported thousands of Jews, including children. Patrick Weil situates the criminal punishment of Holocaust denial "in the context of a series of actions that at certain key moments, the Republic initiates. These actions are always triggered by the end of times of great division, with a goal of creating a new feeling of common citizenry, a new unity surrounding fundamental values, through two paired means: celebration and a radical ban."[90] Through the punishment of Holocaust denial and the commemoration of the deportations, the state is directing its citizens to remember past atrocities for which the nation is collectively responsible. The collective memory serves as a justification for excluding anti-Semitism as a possibility for future exercises of collective self-determination. The fight against racism thus becomes a collective national project, the success of which depends on citizens' solidarity.

The significance of this solidarity becomes salient when comparing French and American approaches to racial discrimination. French law treats the manifestations of racism as an injury to the entire polity and to the state rather than as individual injuries with individual victims. Thus, it criminalizes racial employment discrimination, whereas U.S. law only imposes civil liability. In France, criminal prosecution is the central method by which the law responds to race discrimination in employment, even though civil remedies are also available.[91] Although there are many explanations for this, an extremely important function of criminalization is the recognition that racist acts injure the entire polity, not only the racial minorities at which the racism is targeted In the United States, law has commemorated slavery and segregation through nonbinding resolutions apologizing to African Americans.[92] An apology

[89] Décret 93-15 du 3 février 1993 instituant une journée nationale commemorative des persecutions racistes et anti-Sémites commises sous l'autorité de fait dite "gouvernement de l'Etat française" (1940-1944), [Decree 93-15 of Feb 3, 1993 commemorating the state's participation in racist and anti-Semitic persecution], J O R.F, Feb. 4, 1993, at 1902.

[90] Weil, *supra* note 87 at, 577

[91] I discuss both the procedural and substantive significance of the criminalization of racial discrimination in Suk, *Procedural Path Dependence*, *supra* note 30, at 1340–5, 1368.

[92] *See* Bernie Becker, "Senate Approves Slavery Apology, with Reparations Disclaimer," The Caucus, The Politics and Government Blog of the *New York Times*, June 18, 2009, 4 33 PM, *available at* http://thecaucus.blogs nytimes.com/2009/06/18/senate-approves-slavery-apology-with-reparations-disclaimer/

· probably better than no commemoration at all, but it is striking that American commemorations understand the state's past atrocities as injuries to particular groups rather than threats to the entire state's legitimacy.

What are the consequences of these differences? In the United States, antidiscrimination law is the primary means by which the law combats racism. It, too, is open to all communities. Thus, in the United States, antidiscrimination law is powerfully utilized by whites complaining about the jobs they did not get due to employer actions undertaken to promote employment opportunities for racial minorities. Indeed, such plaintiffs prevailed in the recent Supreme Court case of *Ricci v. DeStefano*.[93] In France, by contrast, the discourse of "reverse discrimination" is noticeably absent. Affirmative action is controversial, but for different reasons: It is discussed by reference to whether racial differentiation is compatible with the abstract republican principle of equality, but never on the grounds that it helps minority communities at the expense of whites. In short, racial equality is a collective goal to be achieved through national solidarity, not a political agenda in which some communities will win and others will lose.

I do not mean to propose a ban on racist speech in America to generate the solidarity necessary to achieve racial equality. Nor is it clear that the French have done a better job at achieving racial equality. But the comparison should lead Americans to reflect more deeply about the significance of solidarity's absence. The French experience of punishing Holocaust denial demonstrates a legal order in which the legitimacy of the state is not undermined by, and in fact depends on, its exclusion of anti-Semitic propaganda. This is because the new legal order is consciously repudiating past anti-Semitism, not only for the sake of French Jews or other minorities, but for the possibility of republican government itself Under such conditions, the state's project of combating racism is conceived as a collective one rather than a way of favoring some communities at the expense of others. Furthermore, as *Beauharnais* demonstrates, our First Amendment tradition has not always been averse to punishing racist speech to promote solidarity between diverse communities. These comparative and historical perspectives should lead us to imagine alternative possibilities for the state's relationship to racism and its past, beyond the free-speech theory of the state.

[93] *See* Ricci v DeStefano, 129 S Ct 2658 (2009) The Supreme Court held that the New Haven (Connecticut) Fire Department violated Title VII by declining to promote white firefighters on the basis of promotion tests on which black and Hispanic firefighters had performed poorly

9

What's Wrong with Defamation of Religion?

Kwame Anthony Appiah

In March 2010, in Geneva, the UN's Human Rights Council (HRC) voted by a narrow margin to accept a nonbinding Resolution on "Combating Defamation of Religions."[1] (Hereafter, "the Resolution.") Resolutions like this one have been offered regularly at the HRC and in the General Assembly, have the support of the Organization of the Islamic Conference (OIC) and the Arab League, and have passed regularly over the last decade in all of these various fora.[2] I think this widespread support is regrettable and I hope that this idea does not gain a serious foothold in international human rights law. In fact, the Resolution had less support in March 2010 than it had had in the past and, as this volume goes to press, it appears that the resolution's proponents have abandoned their efforts, at least for the foreseeable future.[3] I am glad that this is so, and in this chapter I want to explain why. To do this, I will have first to say something about the considerations that I think favor laws against defamation in general; my aim is to make the best case for legal sanctions against defamation of religion in particular before recommending against such legal sanctions.

[1] U.N. Human Rights Council, Res. 13/16, Rep. of the Human Rights Council, U.N. Doc. A/65/53 (Mar. 25, 2010) [hereinafter *HRC Resolution*]. The vote was 20 to 17, with 8 abstentions.

[2] For an overview, see International Freedom of Expression Exchange, "'Defamation of religions' resolution suffers major loss of political support," *available at* http://www.ifex.org/international/2010/03/30/cihrs_reaction/.

[3] Robert Evans, "Islamic Bloc Drops U.N. Drive on Defaming Religion," Newsmax.com, Mar. 24, 2011, *available at* http://www.newsmax.com/Newsfront/article/2011/03/24/id/390671. In its place, the Human Rights Council adopted a resolution condemning violence, discrimination, and incitement to religious hatred without reference to "defamation of religions." U.N. Human Rights Council, Res. 16/18, Rep. of the Human Rights Council, A/HRC/16/2, chap. I (Mar. 24, 2011)

I am very grateful to the editors for their comments on an earlier draft and for helping clarify my claims. The obscurities that remain are, of course, my own responsibility.

I. THE BACKGROUND

The Resolution weaves the concept of "defamation of religion" into a text that endorses many other more conventional moral and legal ideas. The text "strongly deplores" violence and incitement to violence, both physical and psychological, directed against people on the basis of religious belief,[4] for example, and urges governments to offer legal protections to their targets,[5] as well as to religious "places, sites, shrines and symbols" threatened with destruction.[6] What reasonable person could object to that? (Although one might quibble that states ought ordinarily to protect people and property from violence, whether or not it is motivated by hostility to their religion.)

However, the Resolution also endorses some more controversial notions, including the idea that states ought to prevent the "targeting of religious symbols" in the media; thus, apparently, proposing to extend the protections of human rights law from persons to symbols, and so – again, apparently – aiming to limit the freedom of individual men and women to criticize religious ideas, even where there is no showing that their criticism will lead to any harm – save perhaps offense – to any human being.[7]

The document makes no attempt to define (or even give examples of) defamation of religion, but the expression occurs most often in the phrase "defamation of religion and incitement to religious hatred in general," which might suggest that defamation of religion is a *species* of incitement to religious hatred.[8] Granted the tradition of understanding human rights as the rights of individual persons, this suggests that it is incitement to hatred of individual members of particular religious groups that the Resolution has in mind. Were this all that it had in mind, however, the Resolution would be otiose, given that Article 20 of the International Covenant on Civil and Political Rights already requires that "*[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*"[9]

So part of what motivates the Resolution, one is bound to conclude, is the thought that states ought to sanction speech and writing that is contemptuous of religious

[4] *HRC Resolution*, *supra* note 1, at ¶ 3

[5] *Id.* at ¶ 14.

[6] *Id.* at ¶ 16

Other harms that might flow from criticism of religions include damage to life, limb, or property incited by that criticism, as I discuss later in the chapter.

[8] *HRC Resolution*, *supra* note 1, at Preamble, ¶11. Incitement to religious hatred, an established idea in international law, began to be introduced in these resolutions in 2009. *See* Human Rights First, "Focus Paper on Defamation of Religions" 3 (March 2010), *available at* http://www.humanrightsfirst.org/discrimination/pdf/3_2010-focus-paper-defamation-of-religions.pdf

[9] International Covenant on Civil and Political Rights art. 20, ¶ 2, Mar. 23, 1976, 999 U.N.T.S. 171 (emphasis added)

symbols or ideas, not just because of any harm it threatens to people, but bec[ause] it is wrong in itself to display contempt for any religion; and this interpretat[ion] the Resolution's agenda is supported by the way that the preamble to the [Re]solution speaks of "recognizing the valuable contribution of all religions to m[ore] civilization."[10] I take it, that is, that although rather loosely conceived, the id[ea] legal action against defamation of religion attracts people who see something [spe]cially wrong about speaking about religions – usually, other people's religions – [in] ways that display disrespect for them. Left unanswered is why criminal punish[ment] is an appropriate or fruitful response. We certainly owe respect to what deserv[es] respect, and that includes more than people. (The rule of law deserves respect, for example. And so, for that reason, do the people who are struggling around the w[orld] today to implement it.) But even though there are many people and things we ou[ght] to respect, it does not follow that displays of disrespect – even if directed at peo[ple] and things we ought to respect – should be subject to criminal sanction.

In the context of global interreligious dialogue, indeed, it seems unlikely that [the] criminalization of speech offensive to some religious community will be help[ful] in building respect between religious communities. When some Christians or J[ews] say things that some Muslims regard as defamatory of Islam, locking those Jews [or] Christians up (or fining or flogging them) is unlikely to advance dialogue betwe[en] the Abrahamic faiths. Nor is it likely to help create the sort of atmosphere of mut[ual] respect that most people now hope for. *Mutatis mutandis*, the same is true when [the] insults are made by Muslims or Jews against Christianity, or Christians or Musli[ms] against Judaism.

And there are, in any case, people and things that deserve not respect but contempt. Disrespect for Pol Pot or Radovan Karadžić, for example, strikes me as not just morally permissible but morally required. So, too, for racism. And we ought to be permitted, *ceteris paribus*, to express the sentiments that morality demands of us. At the very least then, if the expression of disrespect were to be penalized, it ought to be possible to claim a defense of justification. So if there were a reason why we should *never* display disrespect for a religious idea or symbol or tradition, there would have to be something special about religions.

It might be a presupposition, for example, of the proposal that every one of us ought to have respect for every religion (or every religious idea), whatever our own faith. Or, at the very least, that we should keep our disrespect for any religion to ourselves. But I doubt this is what the supporters of the Resolution have in mind. After all, one religious idea long current in the Christian world is that the Prophet Mohammed is probably in hell. Is that idea one that every Muslim ought to treat with respect? Or to avoid disagreeing with except, perhaps, in the very politest of terms? When you find yourself faced with questions like these, it is sometimes helpful to go back to basics.

[10] *HRC Resolution*, *supra* note 1, at Preamble, ¶ 4.

II. DISTINGUISHING BLASPHEMY

[We] should begin, however, by putting one issue out of the way. The list of the enthu[siasts] for bans on defamation of religion includes many who are clearly concerned [only] to gain support in international law for laws against blasphemy. Those of us [who] are not offended by blasphemy need to do more, I think, to try to understand [what] motivates those who want the state to criminalize speech that dishonors God [or] other persons or objects or practices important to religious communities. I have [always] thought, myself (as someone who grew up as an evangelical Christian), that [God] was particularly well placed to protect His own honor and His own people without the help of the state. State laws – as opposed to religious proscriptions – against blasphemy have always struck me as aimed at protecting someone who should be perfectly capable of protecting Himself.

In multireligious societies, laws against blasphemy are problematic if they commit the state to the truth of particular religious claims, which will be denied by some citizens, even if they are accepted by a majority of others. It is hard even to define blasphemy without such religious claims. (As people in the United Kingdom discovered in the *Satanic Verses* case.[11]) And if you define blasphemy as speech that is regarded as dishonoring by any religious community at all, then you have moved into the sphere of defamation of religion and you are no longer really talking about blasphemy – which is an offense against God, not His people – at all.

It is easy to see why believers are often offended by assaults on the dignity of their God or of other important religious objects: After all, we are all upset by the disparagement of those whom we love and respect, and the offense is likely to be greatest when it is God, whom believers are supposed to love and respect the most, who is disparaged. So the thought that people are not being unreasonable when they react with violence to defamation of religion, and that we may place the burden on avoiding this violence on those who enrage them, is, in my view, not unnatural, even if, in the end, we decide it is a mistake. Even granted that thought, however, it surely matters not just *that* religious persons or ideas have been disparaged but *where* and how and why. In particular, we should want to ban the simple denial of a religious claim – announcing, say, that Christ was not divine, that Mohammed was not the last prophet, or that the Exodus did not occur – only if those who are offended by such a denial are reasonably *entitled* to respond with violence. To find such entitlement, I think, even once we understand the motivations for a concern

[11] Publication of Salmon Rushdie's *Satanic Verses* led not only to the *fatwa* sentencing Rushdie to death, in England, a blasphemy action was brought by a Muslim against Rushdie. The courts dismissed the claim on the ground that the English law of blasphemy only protects Christianity. R. v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury, 3 W.L.R. 986 (1990), *aff'd*, 1 Q.B. 429 (1991). The European Commission then concluded that the law's limited scope did not constitute discrimination on the basis of religion in violation of articles 9 and 14 of the European Convention. *See* Choudhury v. United Kingdom, App. No. 17439/90, 12 Hum. Rts. L.J. 172, 173 (1991).

with blasphemy is either to suppose that religious people are incapable of reas... self restraint or to regard such self restraint as something that should never b... of them. The first of these premises insults most religious people; the second i... to defend in a multireligious world because it undervalues freedom of expres... religious matters.[12]

A state, like Pakistan or Britain, that has an established religion, does take a vi... the question who God is, what He is like, and what behavior toward Him is p... and, while I am against establishment – I think it has bad effects on both cl... and state – I think it can be carried on without breaching the fundamental hu... rights of members of religious minorities.[13] I do not think the fact that Luther... is the established church in Norway in itself ensures that Catholics or Baptists ... must think that the state tramples on their rights.[14] But blasphemy laws do fa... protect minority religions when they expose their adherents to criminal sanc... for asserting what they take to be religious truths, such as that the religious cl... of the established religion are false. Given the fact that religions make incompa... claims, freedom of religious expression necessarily entails that you be permi... to utter words that imply the falsity of other faiths and the wickedness of ot... people's religiously motivated behavior. The old Muslim practice of toleration i... Andalus did not require Christians and Jews to accept the claims of Islam, altho... it did require them to avoid dishonoring the Prophet in the public spaces of ... community.[15] For evangelical religions, like Christianity and Islam, the free exer... of religion is going to require freedom to talk to others about your religion, and i... society where private life is religiously segregated, this will have to involve discuss... in public. But there is a difference, in principle, between public dissent from t... truth of religious claims and dishonoring religious symbols. Construed as a constra... on the latter, the laws of el-Andalus look less worrying than if we suppose they rul... out the former.

III. BUILDING A CASE FOR ANTIDEFAMATION LAW

Three broad classes of considerations offer reasonable grounds for banning publ... speech (or published writing) that is insulting or defamatory. So, to be clear (whic...

[12] There is also a moral hazard problem here. Allowing ourselves to be worried by the threat of violen... encourages violent responses (and threats of violence) from people who want to enforce codes ... blasphemy on people who do not share their faith.

[13] Among the bad effects on the church are the sorts of abuse of state powers that go with Caesaropapism. Among the bad effects on the state is an exaggerated sense of the moral authority of the governmen... over citizens' lives.

[14] Of course, some people no doubt think that every citizen has an individual human right to have the... religion treated exactly like every other by the state. I myself think that states ought to be neutral among religious identities. But the point is that toleration of minority religions and equal treatment under the law in all matters other than the symbolic fact of establishment is consistent with establishment ... do not believe Norwegian Catholics reasonably regarded themselves as second-class citizens.

[15] See Kwame Anthony Appiah, "How Muslims Made Europe," *N.Y. Rev. Books*, Nov. 6, 2008, at 59–62.

Resolution was not), the issue I am addressing is legal restraint of expression ...ed by sanctions, not legal adjudication of claims to compensation for harms ...king from one person's expression about another. The first class has to do with ...c order; the second reflects a concern for the mental state or reputation of the ...n insulted; and the third has to do with questions of honor.

A. *Public Order: Insults and Violence*

...ious threats to public order flow from the use of language that is calculated ...ffend, for two rather different reasons. One sort of offensive speech consists of ... sort of insult that might lead a normal person exposed to it to be so outraged ...t she would respond violently to her insulters. From this point of view, it is the ...consequences for public order – or rather disorder – that flow from such speech that ...atters, not the protection of the victim from verbal abuse. A rather different idea ...is that words can have the aim or effect of inflaming passions in ways that will lead ...to crimes against people or property, especially crimes against those defamed. Here, ...protection of the defamed from physical harm is at the center of concern, and the ...speech amounts to incitement to violence against them.

Whether we are worried about insult leading to violence initiated by its victims or ...against them, context and style of utterance are relevant, because an insult shouted ...angrily is more likely to produce a violent response, and riot and mayhem are more ...likely to be produced by speech addressed to a spirited crowd than murmured in a ...quiet classroom. Also, with both of these rationales, we can identify contexts where ...the expression of the view can be allowed without risk, and so it is not strictly ...speaking the content of the expression – even if the heart of it is an insult intended to ...be recognized as insulting – that is being regulated as its occurrence in circumstances ...where it is likely to have unfortunate consequences.

When we have to decide between regulating expression, on the one hand, and ...allowing it while controlling the violence it may elicit, on the other, it matters both ...what the costs of each will be and whether we think the violence of the responses ...is reasonable. Enraging someone because you know her weak spots may be a bad ...thing to do, but if she responds by hitting you, that may still be her problem. So the question of how people ought to respond to defamatory words – the question which responses are warranted or, at any rate, not unreasonable – is always in the offing. It is not the mere fact that affray results from insult that makes us willing to regulate it; the fact that affray is one not unreasonable response to insult also plays a part.[16]

So, too, does the fact that speech is sometimes easier to regulate than responses to insult. Riots, once underway, are notoriously difficult to restrain; crowds can go crazy under the impact of speech and writing, and when they do, they can do great

[16] Those of a pacific temperament may think that it is always wrong to be provoked to violence. My own view is that this is, at least, not obvious.

harm. Unleashing the madness of crowds is always something that the state has good reason to seek to avoid, so limiting speech on occasions where it will have these effects is an essential role of public authorities and they need the legal means to carry out the task. In doing this, however, it is never what is being said that triggers concern, but rather the effects of saying it. In the right context, insulting an alien religion could be an effective way of *controlling* a crowd's violent impulses. In such a context, defaming another religion might be exactly what pubic order requires.

It is not, then, the content of what is being said that should trigger the thought of restraining speech for reasons of public order. This is true even though there are better reasons to protect public speech about some topics than about others. In American free-expression jurisprudence, political speech rightly ranks high among the contents worth protecting – higher than commercial speech, for example.[17] So it may be that it is worth expending more resources to allow speech and prevent the risk of the violence it might elicit, when the speech, while inflammatory in its effects, is about topics of concern to our common life. Democratic political communities need to discuss what laws should regulate and how they should regulate them. Debates about these matters can, and perhaps sometimes should, raise high emotions A concern for public order can raise the issue whether speech should be barred; but even if speech poses a threat to public order, it may be worth expending the resources to allow it. If freedom of speech is worth something, sometimes the public should pay the costs of allowing it [18] The presence of a credible threat to public order is only the beginning of the analysis.

B. *The Costs of Defamation for Its Victims*

A second sort of consideration favoring the criminal regulation of defamation has to do with effects of speech that have nothing to do with physical violence, in particular. (1) the social damage that comes from loss of reputation and (2) psychological damage.

[17] From among many possible examples, see, e.g., Meyer v Grant, 486 U.S. 414 (1988)

[18] It is perhaps worth observing that such considerations can be "viewpoint-neutral," if you think they should be, if by that you mean that the state should not take sides on the truth-value of claims in a certain domain in deciding whether their expression is worth spending money to protect. Identifying speech as political does not require you to distinguish between those advocating a position and those advocating its contrary You can think each of them entitled to protection if the other is. But I do not think that people who seek a public forum have to be offered protection and allowed to speak if what they say would lead to violence if public resources were not devoted to it – if what they are saying is simply preposterous (which is not a matter of whether we like or dislike what they are saying, but a matter of evaluating its epistemic rationality) So I think that on a reasonable view, whether we ought to spend resources to make it possible for someone to speak without violence can depend not just on what it is about and whether it is relevant for public life, but also on whether it is a genuine contribution to discussion Someone might object that we should not give the state the power to weigh such considerations because it will abuse that power But that is a different question from whether there are such considerations to be weighed (Threatening violence if someone speaks ought always to be a crime, of course. That is one way the law can help protect free expression.)

Reputation is clearly an important social asset, and depriving someone of a reputation can harm her socially and economically. To be sure, there are limits on our concern for loss of reputation. Most obviously, we want to protect people only from *unwarranted* loss of reputation. If the harm arises from the expression of the truth, we have a reason to protect expression, because knowing relevant truths about people helps all of us regulate our relationships with them. Truth ought, for this reason, to be a defense, especially, again, where the subject is of public importance; and even where what is said is not true, good faith ought to be mitigating. In any case, in this area, experience suggests that civil rather than criminal law provides the appropriate means of deterrence and redress [19]

In addition, just as our moral concern in relation to physical violence depends on whether we think of it as reasonable (and therefore, as we say, provoked), so when it comes to psychological damage, we worry most about harm that arises from *normal* or *reasonable* responses to the insult. (Let us call this reason-grounded harm.) When someone's pain is the result of unusual or irrational sensitivities, we are not likely to want to protect her.[20]

But why should we care about the psychological discomfort that is caused by hearing yourself defamed at all? There are many sorts of negative psychological impact we do not protect people from. I am free to cause widespread aesthetic discomfort by painting my car in clashing colors that offend the sensitivities of many. I am free to deprive people of sources of pleasure. I may cut down the beautiful tree on my property that has given pleasure for generations to those who walk by. These consequences may cause more distress to some than a bloodied nose, which most people would want the law to prohibit. So one reason for trying to protect people from psychological harms is just that they are harms. It matters, generally speaking, when people are pained, especially when their pain is a normal or reasonable response to what others have done.

But the costs of legal protections from psychological harm are high. You cannot insulate people from the negative psychological effects of the speech of others except at the cost of severely limiting speech altogether. A world in which we were constantly trying to predict and avoid upset would be a world with much less communication, and many of the desirable consequences of a world rich in communication would have to be foregone. Identifying actual psychological harms is, in any case, a difficult exercise, one that we would be wise to avoid imposing on our courts. And making

[19] But we have also developed the idea that people are entitled to keep even certain *truths* about themselves from public knowledge, and so we have legal protections for privacy, which entail limiting expression. Achieving a balance here strikes me as a difficult and, therefore, interesting problem; I shall say little further about it here, however, because it does not seem to me relevant to defamation of religion.

[20] Peter Molnar asks me whether the special sensitivities of victims of discriminations, of survivors of genocides, which might appear as irrational to some or many, fall into the category of normal and reasonable I think that sometimes they do.

any upset caused by speech or writing a legally cognizable harm incentivizes p to pretend to be upset to shut others up.

An alternative approach to one that seeks to identify actual harm would id the harms a reasonable person would suffer when spoken of in defamatory and aim to prohibit speech that would cause suffering to a reasonable person. an approach provides less incentive to those who might feign offense to get st they do not care for banned by the state. But it faces the difficulty that whethe reasonable to experience psychological pain on hearing speech that is defamato oneself (or those persons and things one cares about) is likely itself to be a functi what expression the law prohibits. Reasonable people adjust to their circumsta The real question is what sorts of defamatory speech we should expect people used to. We need to decide which forms of psychological upset are reason-ground

To make progress with this question, we have to ask what it is in the speec others that can cause us psychic discomfort or pain. A first form of discomfort simply that caused by hearing people say things we wish they would not say. T are many reasons why we might not want someone to say (or write) something:

1. It will lead others to believe things that we would rather they did not bel
2. It expresses a thought we wish they did not have.
3. It is painful to see yourself represented in an unflattering light.
4. It makes public what we would prefer to keep private.

More generally, we can be pained by words either because of the *beliefs* they exp true or false; or because of the *attitudes* they express, warranted or unwarrant toward us and those people and things we care about.

We also have many reasons to care about the consequences of the expressio beliefs, including on our reputations and on the attitudes of others. But I wan focus now on the harms we suffer when someone says something defamatory and are pained by the discovery of the state of mind it reveals, not on the further har that their saying it may lead to.

Putting aside considerations of privacy, where it is the beliefs expressed that p us, we are not generally entitled to protection if they are true; where they are false, w have the remedy of proffering arguments and evidence to refute them. Involving t criminal law in such disagreements does not generally seem likely to be productiv indeed, criminalizing the uttering of falsehoods that upset other people makes it l likely that they will be exposed as false in the marketplace of ideas. And reflectio suggests, in any case, that it is not the fact that people have false beliefs but the fa that they are willing to express them that is usually most unsettling. If that is tru then it is the attitude expressed in the defamatory speech, not the false belief, th really pains us.[21]

[21] To avoid a possible misunderstanding, let me underline that I am considering cases where we ar pained by the mere fact that someone has a false belief about us. Of course, the expression of th belief may have lots of unpleasant downstream consequences for my reputation, which I care about

for the attitudes people express, we can be worried either about the attitude where the words that pain us are evidence of that attitude – or about its ssion. It seems to me that the law ought not to be in the business of attempt- prevent others from making their beliefs known to others; and, given that ttitudes are not normally under our voluntary control, it would be wrong nction us for having them.[22] So I conclude that the one sort of harm from ession that we might want to do something about is the harm that flows from xpression of the *attitude* of the author of defamatory speech. And here the important source of pain derives from the fact that defamatory speech can us the respect of others, which is one of the greatest human goods: It is as an act and as an expression of disrespect that defamatory speech causes That is the essence of the third sort of argument for regulating defamatory eech.

C *Protecting Honor: Seeking to Enforce Respect*

s third line of argument would have recommended itself to earlier theorists uch matters – from Aristotle and Confucius on. But I suspect it would strike ny contemporary people around the world as unfamiliar and implausible. It xemplified in the Scottish Enlightenment by Adam Smith's discussion of the blem of dueling. We all have an interest in preserving our honor or dignity, ith assumed. But dignitary assaults were, in his view, too lightly punished under laws of Great Britain. So people dueled, Smith thought, because it was the only to protect their honor from affronts. "The small punishment therefore which ncurred by these affronts according to our law is one great cause of dueling, d is to be accounted a deficientia juris."[23] Smith's assumption, then, was that we ve a legitimate interest in our honor, that we are entitled to defend it, and that he law provides inadequate means of defense, we will – and we should – pursue vate options. If those private options are objectionable on public grounds, the magistrate needs to provide a satisfactory public substitute for them. If he does t, the deficiency is the state's, not the citizen's.

Criminalizing assaults on another person's honor could be motivated by the ought that *possessing* honor requires you to defend your honor from assault. If we lieve that honor is something worth having and if a disposition to defend your nor is a requirement of being honorable, then failing to provide a legal mechanism r responding to such assaults will lead honorable people to seek redress outside e law. But whatever solution the law offers here, it cannot be a criminal one, for

Among the attitudes that people do not have voluntary control over, of course, is belief. I gather that in American First Amendment jurisprudence, people are treated as having complete freedom of belief, and that Cantwell v. Connecticut, 310 U.S. 296 (1940), is one standard citation.

Adam Smith, "Friday January 21st 1763," in *Lectures On Jurisprudence* (R. L. Meek, D. D. Raphael, & P. G. Stein eds., Liberty Fund 1982) (1762–1763), *available at* http://oll.libertyfund.org/title/196/55597

it is part of the logic of honor that I can restore my honor from a dignitary assault only by doing something myself. The state cannot recover my honor for me; it can, at best, offer me the opportunity to redeem it for myself.

D. *Summary of Reasons for Worrying about Defamation*

All these lines of thought focus on the law of defamation as preventing harms that attach to human individuals; the harms we worry about can be identified by finding those who have been (or might be) harmed and summing the harms they have (or might have) suffered. Even when a group is dishonored, the harm that occurs is harm to the members of the group, by way of the harm each of them suffers when an identity they share is defamed. And the harm I suffer when I am dishonored is not naturally understood as a subjective harm, the consequence of my being pained by being dishonored. How much it matters does not depend on how much it pains me; and, in particular, it can matter even if it does not pain me at all. For honor is, roughly speaking, an entitlement to respect; and if someone denies me what I am entitled to, I am harmed whether I care about it or not.

So defamation in the individual case risks at least five kinds of evil we might want to prevent:

1. violence from the insulted, in response to the insult, and the consequent public disorder;
2. violence against the insulted, incited by the insult;
3. unwarranted damage to the reputation of the insulted;[24]
4. emotional pain suffered by the insulted;
5. harm to the honor or dignity of the insulted.

With all of these, the harm that matters is suffered by individuals, and the total harm is the sum of these individual harms. I stress this point because, so far as I can see, the significance of the distinction between individual and collective insult is not in the harm it causes but in the scale of its likely effects. Group insult is much more likely to lead to affray or riot; and the greater significance of dignitary assaults on groups (as opposed to individuals) has to do with their capacity to harm (or enrage) large numbers of persons in a single act. Now, as I have argued elsewhere, people can be harmed when identities they share are subjected to disrespect.[25] So certain kinds of disrespectful speech harm very large numbers of people. But the correlation between the distinction between individual and collective defamation, on the one hand, and the scale of the threat, on the other, is imperfect. Defaming a beloved

[24] I mentioned invasion of privacy as a reason for limiting speech, it is not a particular problem of group defamation, however, so I ignore it here.

[25] Kwame Anthony Appiah, *The Ethics of Identity* 108–9 (Princeton University Press 2005); *see also* Kwame Anthony Appiah, *The Honor Code: How Moral Revolutions Happen* (W.W. Norton 2010).

religious or political leader can pose threats to public order as substantial as the defamation of a group.

III. PSYCHIC HARMS

In the United States, we are used to the idea that violence and unwarranted loss of reputation are matters that concern the state. So items (1), (2), and (3) on the previous list will look like proper subjects for legal response. We are not inclined to think, however, that the state should seek to protect us from the psychic costs of hearing ourselves defamed, even though the pain caused can no doubt be greater and more long-lasting than the consequences of some physical assaults, which are nonetheless criminal. Where an insult has a propositional content, we are used to thinking, as I said earlier, that the pain matters only if the proposition is either false or an invasion of privacy. If it is true and appropriately public, the utterance of a fact about you is something you have to bear, however unpleasant.

Why should this be? The defenses of truth in libel and of public interest in privacy cases suggest that these rules derive from our thinking of expression as something that should be limited only for very good reasons. Reputation matters to its bearer in obvious ways. But we all also have an interest in the reputations of others being *warranted*, and therefore have good grounds for allowing truth as a defense when reputation is at stake. Privacy involves a complex collection of ideas; but if we are to limit the circulation of truth about people, again we need good reasons for doing so, and we then need to allow as a defense that there is a public interest at stake in the information we have made public.

The foregoing establishes that we need good reasons for limiting insulting speech. But given that people can be seriously harmed by insults, do we not have such reasons? Why should we not offer ourselves protections from these harms? I can think of two arguments. One is that the harm done by offensive speech is, in some sense, enabled by the victim. If what someone else says about me is true, then the harm that flows from public exposure (modulo privacy concerns) often begins with something I did. If it is false, then I can correct it. If it is insultingly expressed, I can only be upset if I care about being treated respectfully by the insulter: and why should I care what he or she says? If I do, my concerns are not reason grounded. "Sticks and stones," my nanny used to say, "may break my bones, but words can never hurt me." The remedies need not involve the state, then, because they are all in my hands. Better if the state leaves them in my hands and I learn to deal with insult.

Despite having my nanny's authority, I do not find this argument all that compelling. A reasonable person will usually be angered by certain sorts of insult – those, in particular, that amount to displays of disrespect or contempt – and is entitled to expect others not to issue unmerited insults of those kinds. Whether the law should stand with the insultee or not, it surely has no reason to stand with the insulter. And

if the fact that I am justifiably upset by an insult means that morality condemns the insulter – even if, in some sense, my upset is up to me – it is not immediately clear why the law should take my role in my anger as sufficient grounds to refuse me its protection.

A second objection to attempting to protect people from psychic harm is another problem of moral hazard. If you make language that causes pain criminal or civilly actionable, then, given the difficulty of actually discovering whether and how much pain has been caused, you motivate people to pretend to have been pained to discourage speech that they happen not to like.[26] (This is a version of the "heckler's veto" problem.[27]) Worse, you may actually encourage people to develop real sensitivities of this kind to restrain the speech of others. These are genuine costs to laws against insult, costs that mean that such laws need to achieve substantial benefits before they should even be entertained.

I think, however, that there is a deeper reason why these sorts of harms do not get much recognition in Anglo-American political or legal culture. We do not think of honor as something that the state should protect; and most of the pain caused by insult comes from the fact that an insult *dishonors* its victim. There are three major social mechanisms for the regulation of behavior: the market, which encourages with prospects of monetary reward; the law, which discourages with threats of civil and criminal penalties; and public opinion, which both encourages with the esteem of our fellow citizens and discourages with their contempt.[28] In the United States, we are inclined to see both economy and esteem as belonging to civil society and not to the state. I do not have room to develop this, but I am inclined to think that there are reasons, of roughly the sort that Adam Smith identified, for the state to protect individual honor, because I believe honor is a natural, proper, and inevitable preoccupation of normal human beings.[29]

IV. WHAT DOES THIS MEAN FOR DEFAMATION OF RELIGION IN PARTICULAR?

As we saw, a legitimate concern for public order may justify the state in limiting speech in certain contexts where it risks provoking violence and maintaining public

[26] Both objections highlight the central difficulty created by the variability of people's responses to insult: in the first case because the damage caused is a feature of the victim's response; in the second because it is part of why it is so hard to tell what real damage has occurred.

[27] The term was coined by Harry Kalven, who pointed out, in the context of limits on speech that provokes a hostile, possibly violent, audience reaction, that "[i]f the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve." Harry Kalven, Jr., *The Negro and the First Amendment* 140 (Ohio State University Press 1965).

[28] This point is well made in Geoffrey Brennan and Philip Pettit, *The Economy of Esteem: An Essay on Civil and Political Society* (Oxford University Press 2004).

order while not banning the speech is either impossible or too expensive to be worth doing.[30] These arguments provide a rationale for the existing requirement in international law that states protect people from incitement to violence against them by virtue of their race, religion and so on. I can see no argument that creating a further special offense of defamation of religion is needed for this reason. So, if there is a justification for extending beyond current protections, it cannot be this.

That leaves us with three possible further reasons that derive from the general account, namely items (3), (4), and (5) from the last list: unwarranted damage to the reputation of the insulted; emotional pain for the insulted; and harm to the honor or dignity of the insulted.

Let us begin with the question of reputation.

A. *Reputation*

The Resolution mentions the fact that, especially since 9/11, there have been frequent attempts in Europe and North America to associate Islam with terrorism.[31] This is a reputational problem that faces almost every Muslim with the possibility of being treated as a terrorist even though he or she is not. It is clear that there would be a genuine burden here, imposed on many, if speech and writing that contributes to the idea that each Muslim is likely to engage in terrorism were to be established in the minds of individual citizens or, more especially, of officials. Now truth, as we saw, is obviously relevant in discussing reputational harm. It matters to whether we should seek to prevent this sort of harm whether the claims made are false – as they clearly would be here – or true. There is, no doubt, much confusion in the minds of those who make such imputations. For example, even if a majority of those who pose terrorist threats in western countries are Muslims, it is a very, very small minority of Muslims who pose this threat. And the scale of the damage that has actually been wrought by Muslim terrorists in Europe and North America is, in my view, often overstated. On the other hand, discussion of the reasons why some people engage in terrorism in the name of Islam is an essential part of the response of all societies to helping face this danger. If someone engages in an act of terrorism in the name of Islam, it is hard to see how we can discuss the problem they pose for us without discussing whether they are right in believing that what they are doing is justified by the tenets or the traditions of Islam. And even if, as I believe, the answer here is a plain "No," we may want to consider what it is about the situation of particular

[30] The richer the community and the more effective its policing, no doubt, the less likely that cost will be a justified excuse. Once more, some might think that allowing the state the very possibility of this excuse will make it very likely that it will be abused. But, as I said in note 18, *supra*, the fact that a legitimate consideration may well be abused by the state does not undermine its legitimacy.

[31] HRC *Resolution*, *supra* note 1, at ¶ 7 (expressing "deep concern ... that Islam is frequently and wrongly

Muslim communities that has made them home to such claims. Treating all such discussion as defamatory of Islam is simply wrong.

Would it be helpful, in these circumstances, to criminalize the speech of those who make false accusations about this matter to protect the reputation of Islam? I do not see that it would. Remember that I have conceded that where speech that is defamatory is a form of incitement to group hatred of the sort that threatens violence, it should be banned under existing international law. So I am focusing here only on the narrow question of reputational harms that do not lead to violence. I cannot see that such criminalization would help, and in some respects it would be counterproductive.

There is, to begin with, already a good deal of suspicion in many quarters that discussion of these issues is conducted without frankness out of a desire to avoid causing offense to the great majority of innocent Muslims. That suspicion would increase if those who spoke frankly risked not just being thought to be Islamophobic but also fines or imprisonment. If the governments of the world want to do something useful in this area, it is far better to respond to defamatory speech with information and a reminder of the desirability of respectful discussion of these matters. Or, more effectively yet, why not encourage the creation of fora within which such discussion can occur? This is surely more likely than the criminalization of a few bigots to effect change.

How are individual Muslims most likely to be harmed by the association of Muslims with terrorism? The answer, I suspect, is that the association makes them more likely to be mistreated by state officials, who "profile" individuals who pose no threat, delaying them at airports, stopping their cars, searching their homes and their property. Governments seriously worried about these harms should surely focus on these civil rights problems, especially where it is their own public officials who are causing it. Those of us who are enthusiasts for freedom of speech believe, however, that in most contexts the best response to unhelpful speech is helpful speech.[32]

This is especially so when the matter in question is one of public political concern. Where an individual's reputation is unjustly harmed, he or she may not have the resources to combat the slur in public without access to the courts. Where the harm is to members of large groups, there are significantly greater resources available in

[32] The classic statement in American jurisprudence is from Justice Brandeis: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Where a religious minority, like Muslims in many European countries, is disadvantaged and badly placed in the contest of arguments, this claim is likely to seem less compelling. But we should worry that a generalized criminalization of defamation of religion is as likely to be used against them as in their defense. And remember, the argument here is not meant to exclude the criminalization of incitement to violence, nor does anything I have said rule out strong legislation against discrimination in housing, employment, and public accommodations.

the public sphere, and the state, with its significant resources, can also play a role in correcting the misinformation. Criminalization, on the other hand, is an easy route to the creation of martyrs to the cause of their religion or to the cause of free speech.

There are other cases imaginable where a criminal remedy would be even less effective. Suppose I say that people of some faith follow a false god, then whether or not this is true is relevant, as usual, to the question whether their consequent loss of reputation (if I am believed) is unwarranted. It seems like a bad idea for courts to be in the business of adjudicating such claims. The most basic reason is that it is widely understood nowadays that there are no methods of settling such questions that are entitled to the universal assent of reasonable people.[33] And a court that has to use procedures that reasonable people have no reason to respect lacks an essential component of legitimacy.

B. *Psychological Damage*

Emotional damage from speech that disparages one's religion is clearly something that one can reasonably hope to avoid in private. You are entitled to quiet enjoyment of your church or temple or mosque, and people who disrupt you are a public nuisance and can reasonably be punished, whether or not the disruption is defamatory. But the banning of the expression of disrespect for a religious idea in public fora would be a reasonable remedy only if the harm done were very substantial and the psychic discomfort were a reasonable response. In states with established religions or substantial majorities of one faith, chances are that the question whether the harm caused was substantial and, in this sense, reasonable would be very hard to adjudicate in ways that would look legitimate to religious minorities, whether the speech complained of was by or about them. The question is whether a legal regime could be crafted that genuinely advanced the interests of those who were in need of the greatest protection. I have my doubts.

There is an interesting analogy here with the treatment of pornography. Someone might argue that people are entitled to be protected from exposure to discussions of their religious life by others just as we are entitled to be protected in public from exposure to sexually explicit representations. Whatever psychic damage is caused in either case could be avoided by identifying images and writings that are potentially offensive to certain people and by warning people to avoid certain private spaces where expression that might be offensive is likely to occur. That way we can keep the public square free of pornography. Why not do the same for speech that is religiously offensive to some?

See Kwame Anthony Appiah, "Causes of Quarrel. What's Special about Religious Disputes?," in *Religious Pluralism, Globalization, and World Politics* 41–64 (Tom Banchoff ed., Oxford University Press 2008).

The answer here, I think, is that it is not a plausible idea that speech about religious matters, like sexually arousing representations, should be confined to a private sphere. Religion is too important to too many people in ways that matter for our public life. Experience suggests that laws against speech that upsets religious sensibilities are bound to be used to keep people free from the possibility of challenge to their faith. And the trouble is that, whereas I, like you, currently think that my own religious view is correct, the possibility that we are in fact incorrect and that we are therefore living in a false belief – the possibility that serious people of all faiths have always entertained is one that argues against this. That is why the freedom to evangelize is rightly regarded as one of the elements of religious freedom. And people of every religion, as well as of no religion, have a reason for wanting it to be possible to face other people with challenges to their faith, namely that this is the only way those people can be brought to see the truth. They are likely to think, too, that in a public debate conducted on terms of rough equality, their own view will emerge sustained rather than undermined, whereas the views of others risk being diminished. We also all have a higher-order interest in having the correct view: and if, as seems likely, the chances of our having the correct view are increased by vigorous free discussion, limitations of freedom of expression on religious matters are an especially serious threat to our interests. It is only if it is best to hold on to your religious view whether or not it is right that limiting discussion of such matters advances our interests. Most religious traditions would rightly not make that claim.

People who are not religious – or whose religion is, so to speak, postmodern – are likely to be skeptical of the importance of reasoning in the shaping of religious affiliation, even in the shaping of religious belief. I am not so skeptical myself. And, in any case, that skepticism is, as I have said, not one that most religious people should share. Given what they believe, they ought to be against the privatization of religion.

C. *Practical Considerations*

So, as you see, even though I can imagine rationales for and practices of religious antidefamation law that would be defensible, I do not think such laws are a good idea in the real world. Let me end with two more such reasons that strike me as simple and compelling and that have to do with the likely effects of laws criminalizing defamation of religion. These are not knockdown arguments or arguments of high principle. But they are arguments nevertheless.

First, as the International Freedom of Expression Exchange (IFEX) has noted: "[T]he banning of forms of expression considered defamatory of a certain religion . . . is often used to discriminate against religious minorities. . . ."[34] Where

[34] International Freedom of Expression Exchange, *supra* note 2.

people whip up hysteria against religious groups in ways that lead to violence, what they do is already covered by laws against incitement to violence: The only effect of special laws about religion is likely to be to allow the authorities to treat innocent behavior by minority religions as criminal, while failing to discourage the much more likely harm of violence by majorities (or the state itself) against religious minorities. In advocating for changes in the limited class of cases where current international human rights law recognizes exceptions to a broad right of free speech, one crucial consideration – as in the reasonable assessment of all proposals about criminal law – is whether such changes are likely to be abused by states.[35]

Second, so it seems to me, one thing we need above all in our world today is greater conversation across religious traditions. Of course, I believe that this is most likely to be productive if it is conducted respectfully, and I believe it should be conducted respectfully whether or not that will make it productive.[36] But the practical effect of laws singling out defamation of religion for special criminal sanction is most likely to be to discourage exactly that conversation. That is one thing, I suspect, that many of those who favor such laws are clear about. They want to protect their own faith from public discussion and scrutiny. I would simply urge them to display greater confidence in their faith and traditions . . . and commend to them the thought that if their faith will not survive debate and scrutiny, it may be the wrong faith.

Free expression matters for two fundamental reasons. One is that expression is central to who we humans are. That makes expression something that we should limit only where other substantial interests are at stake. A second is that a world rich with free expression is one in which we will learn more and learn faster. The state might intervene to advance these ends – arguing that compulsory good manners would improve the capacity of our conversation to produce truth – but once it enters into the regulation of expression, as we have seen over and over again, it tends mostly to do so to advance the interests of those who command the state. So even though I can imagine regimes of laws against defamation of religion that would advance religious understanding, I do not believe that actual laws against defamation of religion are likely to help secure that aim.

In any case, there are other things that it would be more useful to be doing, including developing, through education and in public discourse, a culture of mutual respect among citizens. I have tried to show that, although there are considerations

[35] As Toby Mendel shows, there are too many exceptions here already. *See* Toby Mendel, "Does International Law Provide for Consistent Rules on Hate Speech?," Chapter 22 herein. It has struck me often in listening to discussions of these matters that the expression "incitement to hatred or violence" brings together two very different sorts of wrong. It is bad to hate people who do not deserve it; and it is no doubt wrong to incite people to do what is bad. But if the hatred does not lead to violence or discrimination, then it is not obvious to me why it should be a matter of legal concern. And if it is violence and discrimination that matter, then why not target those directly?

[36] *See* Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (W.W. Norton 2006).

important and crucial and deserves protection. It also goes further in seeking to ensure that protection than the freedom-from-restraint arguments. It responds in a concrete way to the harms caused by hate speech on its targets. The policy I propose also does not counterpose the two goals of responding to the harms of hate speech and preserving freedom of speech. Instead, the two goals are mutually and collaboratively realized. Reconceptualizing counterspeech in this way thus may offer us a way out of the zero-sum game of the free-speech-versus-hate-speech debate.

12

Hate Speech and Self-Restraint

Arthur Jacobson and Bernhard Schlink

It is a truism of comparative constitutional law that the United States takes an absolutist position against the criminalization of hate speech, and that it is alone among the constitutional democracies in taking this position.[1] The First Amendment, as interpreted by the courts, bars states and the federal government from banning hate speech just because it is hate speech and for no other reason. Other constitutional democracies do ban hate speech just as hate speech, and for that reason alone. They may justify the ban differently; they may differ on its extent and consequence. But one way or the other, to one degree or another, they ban hate speech and the United States does not.

The truism recognizes, of course, that the United States, in fact, does ban hate speech. What the United States does not do – and constitutionally cannot do – is ban hate speech *as such*. However, if hate speech falls within one of the well-known exceptions to protected speech, then the First Amendment does not stop the government from banning it. Possibly relevant exceptions include "fighting words"[2] and words that create a "clear and present danger" of imminent lawlessness.[3] Yet the

[1] In 1992, Hungary started to follow the American approach. *See* Peter Molnar, "Towards Improved Law and Policy on 'Hate Speech' – The 'Clear and Present Danger' Test in Hungary," in *Extreme Speech and Democracy* 237 (Ivan Hare & James Weinstein eds., Oxford University Press 2009). Apart from this recent exception, however, the truism remains true.

[2] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), as limited by Cohen v. California, 403 U.S. 15 (1971).

[3] *See* Schenck v. United States, 249 U.S. 47, 52 (1919), as limited by Brandenburg v. Ohio, 395 U.S. 444 (1969). Those who know their First Amendment doubtless note that we have left group libel off the list of exceptions, even though the Supreme Court put it on the list in Beauharnais v. Illinois, 343 U.S. 250 (1952). We do so because *Beauharnais* is of dubious current validity. Crucial to the Court's reasoning was the assumption that statutes criminalizing libel enjoy complete immunity from First Amendment

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exceptions are limited. They permit little more than the criminalization of w... that are tantamount to an incipient assault, and neither of them permits the na... and unadorned criminalization of hate speech.

This striking difference in constitutional doctrine raises a difficult and, for co... tutional democracies other than the United States, awkward series of questions. ... the heart of democracy is free expression. Every constitutional democracy ackno... edges that. And so, constitutional democracies limit free expression only in the na... of defending democracy and human dignity, thus only in the interest of protecti... free and respectful communication. Constitutional democracy, they say, cannot s... vive when hate speech flourishes.[4] Democracy requires a minimum, yet dura... measure of mutual respect among its citizens and between every group mak... its public presence felt. Hate speech corrodes the very core of mutual respect a... threatens democracy itself.

So how is it that the United States can disable itself from banning hate spee... yet remain a constitutional democracy? Perhaps democracy does not require ... minimum measure of mutual respect and constitutional democracies that b... hate speech do so gratuitously. Do such bans reflect a taste, or a historical obs... sion, rather than considered judgment about the requisites of democratic socie... Alternatively, perhaps the United States *does* in fact restrain hate speech just li... everyone else, but in a different way. Might the limited and backhanded way t... United States restrains hate speech be adequate to the task of protecting mutu... respect?

We understand why constitutional democracies regard restraining hate speech ... as essential to the maintenance of democracy. But we also understand why th... United States, in its respect for freedom of expression, does not regard crimina... law as a desirable way of restraining communication. One wonders, then, whether the United States has ways of restraining hate speech apart from criminal law. We thus have been led to investigate three areas to find out whether other mechanisms achieve the same purpose. These mechanisms are: workplace harassment claims

restrictions. This assumption was destroyed in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The *Sullivan* case was effectively brought home to *Beauharnais* by the Seventh Circuit in Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (permitting The National Socialist Party of America to march in the Village of Skokie, which had a sizeable population of Holocaust survivors, while displaying the swastika, despite an ordinance making it a misdemeanor to disseminate any material that promotes or incites racial or religious hatred), cert. denied, 439 U.S. 916 (1978). Were the Supreme Court to revisit the issue of criminal libel, these decisions would bode ill for *Beauharnais*.

[4] *See, e.g.*, Regina v. Keegstra, [1990] 3 S.C.R. 697 (Can.) (Dickson, C.J.C.):

> I am aware that the use of strong language in political and social debate – indeed, perhaps even language intended to promote hatred – is an unavoidable part of the democratic process. Moreover, I recognize that hate propaganda is expression of a type which would generally be categorized as "political," thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way

...dards and practices codes in the broadcast and cable media, and speech codes ... college and university campuses. There are doubtless more.[5] But the three we ...rely adequately reflect the variety of approaches to restraining hate speech in the United States. None of the three makes use of criminal sanctions. Two do not even ...ew directly on the resources of law. Nonetheless, they function as prohibitions ... regulations of hate speech.[6] How effective they are in restraining hate speech, ...pecially by comparison with criminalization, we cannot say. That is an empirical ...estion, and a tricky one at that. We do know this, however. It is simply impossible ... assess the quantum of restraint by focusing narrowly on constitutional doctrine, ... on criminal law, or even on law altogether. One must look beyond external, legal ...straints and also consider self-restraint in civil society. Only then is one ready to compare systems.

I. WORKPLACE HARASSMENT CLAIMS

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, ... privileges of employment, because of such individual's race, color, religion, sex, ... national origin."[7] In 1986 in *Meritor Savings Bank, FSB v. Vinson*,[8] the Supreme Court held the sexual harassment of an employee by a supervisor to be actionable under Title VII. The Court required the harassment to be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[9] Before *Meritor*, circuit courts had held "hostile environment" harassment actionable when based on race, religion, and national origin as well as sex,[10] and after *Meritor* everyone assumed that the Supreme Court meant to do so as well.

The premise of hostile-environment harassment claims is a discriminatory difference in working conditions. It is not enough that behavior be offensive; it must

[5] David Bernstein offers a survey of laws in the United States restraining speech. *See* David E. Bernstein, *You Can't Say That!: The Growing Threat to Civil Liberties from Antidiscrimination Laws* (Cato Institute 2003).

[6] On the concept of functional equivalence in comparative law, see Ralf Michaels, "The Functional Method of Comparative Law," in *The Oxford Handbook of Comparative Law* 339–82 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2006), and the sources cited therein.

[7] 42 U.S.C. § 2000e-2(a)(1). For the sake of simplicity, we focus on the categories protected in Title VII. Two similar statutes protect other categories: they are the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–633a, and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. Nothing in the analysis changes. We also consider workplace harassment claims at the federal level only, and equate the law at the federal level with the "American" model. States have their own, often different, antidiscrimination laws.

[8] 477 U.S. 57 (1986).

[9] *Id.* at 67.

[10] *See, e.g.*, Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).

actually change the employee's working conditions. "Conduct that is not severe and pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview."[11] And it is not enough that the behavior actually changes the employee's working conditions. It must also constitute unequal treatment "because of" a category protected by Title VII: "The critical issue, Title VII's text indicates, is whether members of one sex [or race, or religion, etc.] are exposed to disadvantageous terms or conditions of employment to which members of the other sex [or race, or religion, etc.] are not exposed."[12]

Hostile environment harassment includes behavior that would be classified as hate speech in a jurisdiction where hate speech is an operative legal category. Of course one must adjust for cultural, social, and political differences, yet it remains tolerably true that hate speech may be comprised and controlled by hostile-environment harassment claims. The only Title VII specific requirement is that the hate speech differentially affect the workplace conditions of a member or members of a protected category.

At the same time, actionable harassment also may, and often does, include behavior that does not come close to hate speech. This is especially true of sex discrimination, where the change in workplace conditions may be the result of behavior that runs the gamut from the merely offensive (unwelcome sexual advances,[13] distasteful or degrading remarks or behavior[14]) to the hatefully violent,[15] only some of which some of the time, will be hate speech.

It is of decisive importance to the structure and operation of this mechanism of restraining hate speech that the harassment claim lies against the employer, not against the harasser. The harasser may be liable in tort under state law – intentional infliction of emotional distress, assault, outrage, even, in some states, the tort of

[11] Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

[12] *Id.* at 25 (Ginsburg, J., concurring). And so the courts of appeals have concluded, at least after Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), repeated and elaborated *Harris*'s insistence on a finding of unequal treatment. Where, for example, a supervisor abuses members of both sexes equally, lower courts have found no disparate treatment of either sex. *See, e.g.*, Holman v. Indiana, 211 F.3d 399 (7th Cir. 2000), overruling McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996). However, courts have sometimes found that the same abuse may impact women more harshly, and thus be remediable under what is in effect a disparate impact theory. *See, e.g.*, EEOC v. National Educ. Ass'n, Alaska, 422 F.3d 840 (9th Cir. 2005), Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994).

[13] *Meritor*, 477 U.S. at 68 ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'").

[14] *See, e.g.*, McLaughlin v. New York, 739 F. Supp. 97 (N.D.N.Y. 1990) (prima facie case of sexual harassment supported, in part, by distasteful and degrading comments).

[15] *See, e.g.*, Little v. Windermere Relocation, Inc., 301 F.3d 958 (9th Cir. 2002) (holding that an employer's actions and inactions after the employee reported that she had been raped by a customer may form the basis of a hostile work environment claim).

harassment[16] – but not under Title VII.[17] Only the employer is liable.[18] And the employer must answer to the victim of the harassment, not to a prosecutor wielding the power of the state, with its own interests, its own agenda, its own inertia. All the differences between hate crime and workplace harassment claims flow from these two facts.

Consider three salient features of restraining hate speech through criminal law:

1. Hate crime statutes express and impose the will of the state, without the participation or contribution of any individual or of any institution mediating between the individual and the state.
2. The statutes address individuals primarily; they address institutions and organizations only secondarily, as aggregates of individuals.
3. The statutes threaten punishment as the state defines punishment, either imprisonment or fines; they do not seek compensation for victims or rely on methods of control other than punishment.

Restraining hate speech through workplace harassment claims differs in all three features. First, workplace harassment claims resemble criminal prosecution in that they express and impose the will of the state. This much is true of any regulation based on a statute. Unlike prosecution, however, a harassment claim may be initiated and prosecuted by an individual.[19] The individual decides whether to press the claim and

Cf. Stevenson v. Precision Standard, Inc., 762 So.2d 820 (Ala. 1999) (an independent cause of action for sexual harassment does not exist under Alabama state law; instead, claims of sexual harassment are maintained under common law tort theories, such as assault and battery, invasion of privacy, negligent training and supervision, and outrage).

See, e.g., Lissau v. Southern Food Serv., 159 F.3d 177 (4th Cir. 1998).

[16] The standard for employer liability depends on the role of the employee who is doing the harassing. If the harasser is a co-employee of the victim, then the employer's liability is judged by a negligence standard; the employer is liable for a coworker's harassment if it "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. 1604.11(d) (from the EEOC's Guidelines on Discrimination Because of Sex, quoted approvingly in Faragher v. City of Boca Raton, 524 U.S. 775, 799, 800 (1998)). If, on the other hand, the harasser is "a supervisor with immediate (or successively higher) authority" over the victim, then the employer's liability depends on whether the supervisor's harassment "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Faragher*, 524 U.S. at 807, 808. If the harassment does culminate in a tangible employment action, then the employer is liable as if the supervisor were his agent. *Id.* at 790. If the harassment does not culminate in a tangible employment action – if all the supervisor has done is differentially alter the terms or conditions of the victim's employment – then the employer can avoid liability by proving an affirmative defense. The affirmative defense requires the employer to show "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 807.

[17] The Equal Employment Opportunity Commission (EEOC) may initiate claims or intervene in claims initiated by individuals. 42 U.S.C. § 2000e-5(f). Typically, however, the EEOC leaves enforcement to individual claimants, taking on the role of attempting to conciliate disputes between employer and employee prior to the latter's filing in court. In some cases, the EEOC will also participate in

controls its timing, the remedies to pursue, and whether, when, and how to settle. The harassment claimant can also press the court to adopt new theories for claims or defenses or to drop old ones. The claimant shares with the state the enforcement and creation of the law. The victim of a hate speech crime, in contrast, is utterly dependent on the whim – or, to be kind, discretion – of the prosecutor. He cannot control enforcement (although he can influence it, at least negatively by refusing to cooperate). When hate speech comes to the attention of the prosecutor because the speech is in some way public – in a newspaper, on the television, at a rally – then the victim does not even need to play the role of reporting the crime to the authorities. He does not even need to testify at the trial being prosecuted in the name of his or her benefit. The caption of the report of the trial – and captions are no small thing – reads "People v. Hate Speaker" rather than "Victim v. Hate Speaker."

Second, Title VII harassment claims do not address the harasser; they address the *employer* of the harasser. It is the employer, not the harasser, who has the burden of making sure that the workplace is free of harassment. The employer may or may not discipline the harasser, may or may not give the harasser an incentive to change his ways. Or, instead, the employer may plead with the harasser, warn the harasser, transfer the harasser to another office or another part of the factory floor where he is less likely to find himself in trouble. Only some employers, in some cases, will fire the harasser, make the harasser take a leave, or dock his pay. The employer's job is not to do justice; it is to manage the harasser, and management serves interests alien to the law.

Moreover, Title VII does not cover small employers, only large ones.[20] So far as federal law is concerned, mom-and-pop enterprises can engage in as much discrimination as they please without legal consequence. Employers large enough to be covered by the Act, therefore, are likely to be organizations or institutions, not individuals, because sole proprietors tend to seek the protection of limited liability when the number of employees to manage – and therefore lose track of – gets too large. The immediate, on-the-ground enforcers of federal antiharassment law, the ones who Title VII seeks to mobilize for the suppression of workplace harassment, are thus organizations or institutions, not the state and not individuals. The organizational or institutional employer becomes a private police force working gratis on behalf of the state to forestall and, if necessary, sanction behavior that the state wishes

fact investigation. *See* 42 U.S.C. § 2000e-5(b). The statute actually *requires* the EEOC to make an investigation, but the commission has long since rescinded its full investigation policy in favor of a three-tiered priority list. *See* 4 Lex K. Larson, *Employment Discrimination*, § 73.06, n. 2 (Matthew Bender).

[20] Title VII defines "employer" (and therefore the persons it covers) as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b). Of course, "agent" is more likely to include individuals than "employer" since "agent" is not limited by the 15-person/20-week requirement, yet the fact of the matter is that one rarely if ever sees a claim against an individual.

would go away. The employee experiences the employer, not the government, as the normative and practical source of the policy; the law virtually requires the employer to feign, if it does not have, an authentic desire to banish harassment. (When an employer circulates its antiharassment policy, it does not say, "Government mandate requires Wonka Widgets to circulate this policy. Harassment violates Title VII and therefore, etc." It says, "Wonka Widgets strongly believes that harassment is wrong and will do everything in its power to stop it." Only by showing vigorous and credible efforts to stamp out harassment can the employer be sure of avoiding liability should harassment occur.)[21] Federal antiharassment law thus breaks the direct relationship between state and individual that criminalization imposes and requires.

Third, because the relationship between the state and the individual in federal antiharassment law is indirect, because Title VII interposes the employer between them, the sanction that the state wields in direct relationships with individuals – the criminal sanction – ceases to be appropriate. A hate speech statute addresses the perpetrator of the wrong. Title VII does not; it addresses the perpetrator's employer. A hate speech statute tells the perpetrator, "If you say hateful things, you are a criminal, and we will prosecute you and convict you for committing a crime." Can the state say anything like that to a harasser's employer? Can the state make the case that the harasser's employer is a criminal? The only wrong the employer has done is employing and then perhaps tolerating a harasser. Is it criminal to employ people who commit wrongs, even racist wrongs, even in the workplace? Is it criminal to tolerate their wrongful behavior? These are fair questions. They have no obvious or simple or universally correct answers. Far easier for the state to say to the employer: "We want to cut down on the amount of harassment in the workplace. We would like to enlist your help. Who better than you to give it? All we ask is that you make a decent effort to put a stop to harassment. We would like you to do what an employer can do to persuade employees not to harass each other. We know you don't have available to you the sanctions of criminal law. But you can educate, and you can impose your own sorts of sanctions. If all that fails, as it will upon occasion, we won't hold you responsible. But if you won't make the effort, then we will hold you responsible, but only for putting the victim of harassment in as good a position as he or she would have been in had the harasser behaved properly."

This is the deal that Title VII thrusts on employers.[22] It is a far more palatable deal than saddling employers with criminal liability for the behavior of persons over whom they have only partial control. But note the consequence. Instead of a single regime of criminal liability that punishes the harasser, Title VII is two different remedial regimes operating at two different levels. The first is a regime in which the

[21] *See supra* note 18.

[22] To be more precise, this is the deal Title VII imposes on employers when the harassment is not connected with a tangible employment action against the victim. If the harassment is connected with a tangible employment action, then the employer cannot avoid liability by exercising reasonable care to eliminate harassment. *See supra* note 18.

state forces the employer to compensate the harasser's victim, unless the employer can show that it tried to stop the harassment and the victim did not try to avoid it.[23] The harasser himself is exempt from making compensation. Nor does this first-level regime punish the harasser. It leaves dealing with him to the second level, in which the employer tries to shield itself from liability for a harasser's behavior by installing internal mechanisms designed to stop harassment or alleviate its consequences once it has occurred.

This bi-level regime created by Title VII resembles a delegation by the legislature to private entities of the administration of a portion of public law. It is in one respect no different from any delegation to any administrative agency: A statute loosely defines a goal or a subject matter or a problem and asks the delegate to do something to reach the goal or grapple with the subject matter or solve the problem. It allows people whom the delegation is designed to benefit to take the delegate to court for a determination of whether the delegate has honestly been trying to do its job. The statute requires only a good-faith effort, not absolute "success" (whoever defines success and however it may be defined). All the delegation does is deprive the delegate of the power to choose whether or not to make that effort. In this one respect, therefore, the employer is an arm of the state. In other respects, however, the task that Title VII thrusts on employers differs from delegation to an agency.

First, in the case of agencies, the delegation is to a single entity that performs the delegation in a unified and coherent way throughout an entire jurisdiction. Title VII, in contrast, speaks to *employers*, to multiple entities, each carrying out its task in its own way with its own intensity and variations. Of course, the efforts of employers to comply with Title VII do wind up following certain well-beaten paths, whether consciously or not, if not between industries then certainly within a single industry. Nonetheless, the responsibility for administering Title VII falls to many hands. A decision by one employer will have no necessary effect on decisions by other employers; ensuring one employer's compliance with Title VII will not assure compliance by others.

Second, an employer failing to do the job thrust on it by Congress must pay damages. An agency that does not do its job can be rebuked by a congressional committee or reviewed in court, its staff dismissed or reshuffled. But both Congress and the courts, with some exceptions, have been committed to the view that citizens have no recourse against agencies for neglect or failure of enforcement.[24]

Third, entrusting (at least) frontline Title VII enforcement to private entities rather than to an agency dramatically alters the possibilities of enforcement. An employer has at its disposal an entirely different toolbox for dealing with harassment. This is especially true in comparison with a prosecutor's office, the agency responsible for the prosecution of hate speech. Even though American jurisdictions are getting more creative these days in sentencing (specialized drug courts can order therapy, for example), the prevailing currency of criminal courts is still punishment. Employers always have "punishment" as an option (as employers punish). But scouring harassment from the employer's ranks is fundamentally a problem of management – of balancing costs and benefits, creating incentives and models, steering people in particular directions, seeing what works and what does not. It is also, therefore, in the end a problem of education, of training (or making sure that someone else has trained) the employee not to harass just as one trains him to do his job or to know his skill. Management demands trade-offs. At the level of management, antiharassment becomes one interest among many to be served. We pursue interests in the shadow of management – of ordinary business acumen and needs. In the first-level regime, the contact of state with employer, antiharassment constitutes a right to be pursued.[25] In the second-level regime, the contact of employer with harasser, it constitutes an interest to be served. The right to be free from harassment necessarily encounters and intertwines with practices, structures, and goals that from the law's perspective modulate the right. This, we suppose, is true of any legal phenomenon. But here the law intends for this to happen, for enforcement to appear as management and for liability to be deflected from the actual harasser.

Comparing the administration of hate speech sanctions with the broader remedial palette available in Title VII's bi-level enforcement regime, one is struck by what amounts to a quid pro quo. In the passage from hate crime to Title VII, the state gives up absolute control over the sanction and abandons recognition of its own interest

[23] On the affirmative defense to a harassment claim outlined in *Faragher*, 524 U.S. 775, see *supra* note 16. We use the term "compensation" to indicate a remedial scheme whose complexities would take much patient exposition to thread. Here is a stark and simplistic summary. Since 1991, Title VII complaining parties have been able to seek compensatory and punitive damages. 42 U.S.C. § 1981a(a)(1). Prior to 1991, complainants could seek only equitable remedies, such as back-pay, reinstatement, and an injunction. Congress had initially envisioned the remedial powers of the court under Title VII to be those of a chancellor. But compensatory and punitive damages are available only if the employer engaged in unlawful intentional discrimination (and only if the complaining party cannot recover under 42 U.S.C. § 1981). Thus an employer that is liable under Title VII only for the discriminatory impact of a facially neutral employment practice but has not intentionally discriminated is subject to neither compensatory nor punitive damages, the victim may seek one of the equitable remedies provided in Title VII, as appropriate.

"Punitive damages" has a particular meaning in the Title VII context. The Civil Rights Act of 1991 provides that a Title VII complaining party may recover punitive damages against a respondent (other than a government, government agency, or political subdivision) "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The Supreme Court has rejected the equation of "punitive damages" under Title VII with "punitive damages" in ordinary tort law. *See* Kolstad v. American Dental Association

[24] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985) (holding that an administrative agency's decision not to institute enforcement proceedings is presumptively not subject to judicial review).

Even here one must notice a caveat (there is always a caveat in the law). Title VII requires the EEOC to attempt to "conciliate" disputes between employers and aggrieved employees. 42 U.S.C. § 2000e-(5)(b). Conciliation is an aggressive form of mediation. *See also* 29 C.F.R. § 1601.20. Here two

as paramount. What civil society gets, in return, is transmutation and adaptation of the state's interest to suit the interests, ways, and means of civil society. What Title VII accomplishes, in effect, is mobilization of the energy and effectiveness of civil society behind a hybrid of the state's and the victim's and the employer's objectives. Antiharassment law may perform the same function as statutes criminalizing hate speech, but it does so in a different way, reflecting different concerns yielding different consequences

In the regulatory regime sponsored by Title VII, law plays a direct yet nonexclusive role It takes on an ally in management The regulation of hate speech in Title VII is thus Janus faced. On the one side, it uses instruments of law – claims, regulations, corporate controls, and corporate equal employment opportunity officers – designed to fend off liability. On the other side, it hosts a grab bag of motives and methods Management may indeed just be responding to the law, regulating hate speech just to reduce exposure to workplace harassment claims. But it may also be responding to ideal motives. It may be banning hate speech because it has a certain vision of corporate responsibility, not because – or not just because – it wants to reduce exposure. It may be banning hate speech because its shareholders want it banned. It may be banning it because of a fear of publicity, or because its customers will not patronize an enterprise that tolerates hate speech Or it may have other motives. articulate or inarticulate.

The point is that one side of Title VII's face is management, and management, precisely because it is not the government and not subject to the constraints of the First Amendment, may, if it wishes, ban hate speech as such. Private actors in the United States may accomplish what is forbidden to the state. The typical antiharassment statement that an employer publicizes to its employees does not say, "You may harass any other employee you wish because of race, sex, etc., so long as the harassment doesn't change the employee's working conditions." Or, "You may harass any other employee you wish because of race, sex, etc., so long as you harass everyone equally." No, it says: "Don't harass any other employee because of race, sex, etc., and if you do all hell will break loose, whether you change their working conditions or not, whether you are an equal opportunity harasser or not." The employer does not care a whit for the jurisdictional premise that makes government action in the form of Title VII constitutionally tolerable. It is a private employer, not the government, and because of the generality of the typical antiharassment statement, private employers often wind up exceeding the government's constitutional powers. The government can honestly say, "We stand by our constitutional premise and when a workplace harassment claim comes to court we require a discriminatory change in working conditions. What the employer does in the course of partnering with us to regulate hate speech is not our business." But the fact is, the government's partner is banning hate speech.

We do not claim that mobilization of the resources of civil society in the interest of law is an innovation of Title VII. Certainly Title VII is a prominent example. But other examples are common. Nor do we claim that legal scholarship has neglected this mobilization. It surely has not. All we claim is that it is vitally important when comparing legal systems to look at the resources law mobilizes as well as the doctrines it propounds Only then can one know what and how the law seeks to control.

II. CIVIL SOCIETY

Once one recalls – for that is the correct word here that civil society has instruments at its disposal for banning hate speech even if the government does not, then the puzzle with which this chapter began – how is it that United States can refrain from criminalizing hate speech and remain a constitutional democracy? is solved. The *government's* refusal to ban hate speech does not stop civil society from banning it, and doing so as effectively as the criminal law.

We have chosen two institutions in civil society to consider, each of which covers a large and important tract of American life. These are the broadcast and cable industry and higher education. Both institutions commonly, even universally, ban hate speech. The first does this quietly, without drawing attention to the fact that it does. The second does so openly. The first constitutes what has long been the public square of American life. (Now it must share that role with the Internet.) The second conducts an education into public consciousness Unlike the workplace, which vexes classification as either public or private, both these institutions play the role of the public reaching into and forming or educating the private One of them comes into your home; the other becomes your home, at least for many, at least for a time. Unlike employers enforcing Title VII, however, neither institution forms an arm or agent of the government Even though they represent the public, they are unabashedly private and aggressively lay claim to all the freedoms that privacy in America enjoys.[26] Hence regulating hate speech for them is, in large measure, if not entirely, an expression of freedom. It is what they wish or think they need to do. It is civil society regulating itself, restraining itself in its own way for its own reasons, as distant as can be from the model of regulation offered by criminal law.

A *Standards and Practices in Broadcast and Cable*[27]

Every broadcast and cable network in the United States has a censor. Every network pays the censor to do its job The network hires the censor and fires the censor. The censor is not just one person. It is a *division*, typically known by the name "standards

[26] Of course, state-sponsored universities, at least in theory, do bear certain marks of the public. We shall see, however, that the differences between public and private universities are, in crucial respects and certainly in public perception, considerably less than meets the eye.

[27] We had the invaluable assistance in the preparation of this section of an attorney experienced in standards and practices in the broadcast and cable media We shall refer to the conversation with this attorney as "private conversation"

and practices." Actually it is three separate divisions. One of them is devoted to regulating the content of commercials, another to monitoring news shows, and a third, entertainment. All of them ban hate speech

It is hard to come by information about standards and practices. Networks guard their codes as proprietary information. The codes' existence is public;[28] their contents are not.[29] What little information there is often becomes public during a controversy, for example when a network is forced to defend a controversial news broadcast.[30] The codes are secret for a variety of reasons. First and foremost, code content is a target of special interest groups.[31] Networks can avoid negotiating with these groups over language if the groups do not know the language. Also, networks want to maintain

[28] Bruce Linton, "Self-Regulation in Broadcasting Revisited," 64 *Journalism Quarterly* 483, 486 (1987) ("Stations do have guidelines").

[29] *Id* at 487 n. 29 ("All of the manuals given to this writer by station managers. . .[were] provided in confidence and cannot be cited specifically as to the station")

[30] For example, the Thornburgh-Boccardi Report detailing the errors in the CBS 60 *Minutes Wednesday* Dan Rather segment, "For the Record," about George W Bush's Texas Air National Guard Service, says simply that "CBS News established Standards for its News Division in 1976 and most recently revised those Standards in 1999 The Standards are set forth in an internally published CBS News Standards Manual covering four areas: personal standards, production standards – newsgathering; production standards – editing and production, and legal issues As set forth in the Introduction to the Manual, most of the Standards 'come down to two essential principles: *accuracy* and *fairness*'" Report of the Independent Review Panel, Dick Thornburgh and Louis D Boccardi, *On the September 8, 2004 60 Minutes Wednesday Segment 'For the Record' Concerning President Bush's Texas Air National Guard Service* 41 (Jan. 5, 2005), *available at* http://www.cbsnews.com/htdocs/pdf/complete_report/CBS_Report.pdf

In testimony before Congress about a report she co-authored, "Television's Performance on Election Night 2000: A Report to CNN," Joan Konner, Professor and Dean Emerita of the Columbia University Graduate School of Journalism, said: "Public affairs journalism is the pursuit of truth in the public interest, and its major values are accuracy, fairness, balance, responsibility, accountability, independence, integrity and timeliness. Those are the standards that informed our judgment, and they are the standards that define professionalism, according to the written codes of most mainstream organizations and the journalists that work for them." Election Night Coverage by the Networks: Hearing Before the House Committee on Energy and Commerce, 107th Cong. 35 (2001) (statement of Joan Konner, Professor of Journalism and Dean Emerita, Graduate School of Journalism, Columbia University)

Bruce Linton's article, *supra* note 28, was written in the wake of the National Association of Broadcasters abandoning its code in 1982, when the Department of Justice won summary judgment in a suit against the NAB alleging that some of the advertising restrictions in its code violated the antitrust laws

[31] In the words of one industry participant, in a private conversation, standards and practices are a "flashpoint for advocacy interest groups," and these groups "are not always reasonable" "Pressure groups are organized and vocal" Linton, *supra* note 28, at 484. Alice Henderson and Helaine Doktori have written about their work in standards and practices. "We also meet with representatives of various recognized special interest groups who frequently offer insights to their specific areas of concern Input from these organizations, our affiliated stations, and our viewing audience is given careful consideration in the formulation and application of CBS broadcast acceptance policy." Alice M. Henderson and Helaine Doktori, "How the Networks Monitor Program Content," in *Television as a Social Issue* 130, 130 (Stuart Oskamp ed., Sage Publications, 1988). *See also* Kathryn C Montgomery, *Target Prime Time Advocacy Groups and the Struggle Over Entertainment Television* (Oxford University Press 1989).

maximum flexibility; they do not disclose restrictions explicitly so they can adapt as situations require. They believe that it is hard to be flexible if you are getting pressure to stick to language that you have already approved in writing saying what is acceptable and what is not.

If their content is hidden, the codes' motivations are clear. Prior to 1982, the National Association of Broadcasters (the "NAB") published a code, the dual purposes of which were to fend off government regulation and to minimize audience and advertiser dissatisfaction.[32] In 1982, the Department of Justice won a summary judgment motion in a suit against the NAB alleging that some of the advertising restrictions in the code violated the antitrust laws. The industry responded by withdrawing the *entire* code, not just the affected provisions. It did so because it felt that politically it did not need one given the then-prevailing antiregulatory climate.[33] But that put the question to the networks: If the government does not care, do you? Do you really want to live by a code or did you have a code to fend off government regulation? The answer was: Both. We really do want to live by a code: Our advertisers and viewers demand it *and* we always fear content-based regulation.

"Our standards address the 'mass audience' that watches us," says a statement of the CBS/Broadcast Group, "recognizing that, in the final analysis, it is the individual viewer that establishes his or her own standards, for it is in the viewer's power simply to change channels or turn us off."[34] As one person in the industry told us, "Standards and practices is about brand protection."[35] Others have said:

> One of the most important factors in our review is the audience's expectation Not only does the viewing audience for individual programs vary . . . but every individual viewer brings a different attitude and background . . The editors in Program Practices are trained to review program material with a view toward meeting this enormously complex set of audience expectations [36]

FCC regulation of content is rare and limited. It does regulate "indecency," but only in broadcast, not cable, and with the narrow goal of preventing content that parents would like to keep from their children while children are likely to be watching television.[37] Nevertheless, the possibility of more intrusive regulation always looms, and fear of that accompanies "brand protection" as a subsidiary impetus toward

[32] *See* Patricia Brosterhous, "United States v National Association of Broadcasters. The Deregulation of Self-Regulation," 35 *Fed Comm. L.J.* 313, 315 (1983)

[33] *See id* at 341–5. The NAB replaced the code in October 1990 with an anodyne "Statement of Principles of Radio and Television Broadcasters" The Statement has little bark and no bite *See* Mark M MacCarthy, "Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour, and Television Violence," 13 *Cardozo Arts & Ent. L.J* 667 (1995)

[34] CBS/Broadcast Group, "Program Standards for the CBS Television Network," in *Television as a Social Issue*, *supra* note 31, at 132, 133.

[35] Private conversation

[36] Henderson and Doktori, *supra* note 31, at 131

[37] *See* Patricia Daza, "FCC Regulation: Indecency by Interest Groups," 2008 *Duke L & Tech. Rev.* 3 (2008)

self-regulation. The networks have one eye cocked at the public, the other at the FCC.

Because the dominant aim of standards and practices is protection of the network against adverse public reaction, we can expect differences among codes. (Even if the language of two codes happens to be the same, there may be differences in application.) Some networks fish in the same waters. If "brand protection" is indeed the watchword of standards and practices, then these networks should make similar decisions about content. But other networks fish in other waters. Their standards-and-practices decisions should reflect the difference. And they do.[38] Even within a single network, individual stations make their own decisions about content, and stations in different parts of the country have different sensitivities and different thresholds of tolerance. Variation also exists within a network between different standards-and-practices divisions. News divisions have more flexibility in their standards and practices than do entertainment divisions. News standards and practices may permit the airing of a violent incident that entertainment standards and practices would prohibit. The word "nigger" is absolutely forbidden in entertainment but would probably be allowed in a documentary about the Ku Klux Klan.[39]

Standards and practices classifies hate speech under the code rubric of "offensive language," though "offensive language" is a broader term. It is regarded as "one of the more difficult areas." The actual standard depends on the context and content of the show. The offensive language standard is "thornier" than others. What is allowable – the actual standard – "develops over time" and is variable depending on the audience and advertisers of a particular program and the particular genre (news vs. entertainment).[40] In part, network standards-and-practices practitioners find the "offensive language" standard difficult because it presents them with a dilemma. On the one hand, they experience a sense of responsibility toward the clients, where the clients are the network's advertisers and audience. On the other hand, where the goal is entertainment, they do not want the end result to be bland. So it is that standards-and-practices practitioners find news and reality easier than fiction, because they do not present this dilemma. Nonetheless, they have "made peace" with the need to regulate offensive speech.[41]

Network standards and practices divisions are private censors. They represent their fraction of the public, their market niche, just as the government as a whole claims to represent the public as a whole. They pay tribute to those who must be feared. Unlike the government, however, they live under a perpetual referendum. The voters are

[38] Private conversation.

[39] Private conversation. Peter Molnar has pointed out that as a consequence a network would not air August Wilson's play, *Joe Turner's Come and Gone*, because characters say the word "nigger" (August Wilson, of course, is black), nor would it air an irreverent black stand-up comedian who uses the word.

[40] Private conversation.

[41] Private conversation. Alice Henderson and Helaine Doktori capture the dilemma unwittingly: "Generally speaking, our concerns in Program Clearance are that plots and characters be balanced in the presentation of ideas and issues and that sexual themes, violent action, and language be neither gratuitous nor exploitative." Henderson and Dokton, *supra* note 31, at 131. Enough said.

their viewers and advertisers. They vote by turning a show on or turning it off, by placing ads on it or not placing ads on it. But standards and practices "legislates" just for their fraction. The broadcast and cable industry censors the public sphere, but only in a patchwork fashion. They do not distil the common sense of the community as a whole. Indeed network audiences do not form a community of any sort. They are dispersed, anonymous. Like law, they dictate what will and what will not go on air. In their application they result in what are, effectively, adjudications. They govern behavior. Producers know what they say and adjust program content accordingly. They have teeth; if standards and practices will not approve content, it does not get aired. And whereas law reflects the morality of a community as a whole, they do reflect the morality of different groups of people – the network's audiences and its advertisers. So whereas law often just represents the moral minimum of different groups and strata of society, they reflect moral maxima of different groups and strata.

And the codes are secret, which diminishes them as law. They are known to and by those they regulate, but are invisible to the supposed regulatory beneficiaries or the larger society. They do not announce the practical morality to the very people from whom it has been drawn. They do not permit a people to be in conversation with itself. That is an essential – perhaps *the* essential – function of law. If a people cannot be shown its practical morality, then the people cannot know itself. It cannot know what it is endorsing because it cannot know what it is rejecting. It cannot know whether it approves or disapproves of what it has turned out to be. The most familiar of metaphors is best. Law holds up a mirror to a people. It permits a people to see who they are and who they wish to be. Standards-and-practices codes cater to our moral predilections but shield us from knowing what those predilections are and how they are recognized and enforced as rules. But without knowledge, we cannot take responsibility. We lose the power of progressive moral beings. We lose the gift of dissatisfaction. It is one thing to have a moral predilection, quite another to acknowledge that one has it. We might be satisfied to have a predilection, but not to see it as law.

Because standards-and-practices divisions operate in secret, they can reach more deeply and regulate more intensively than the state. Regulation in a constitutional democracy must always be public. It is therefore subject to law and political constraint. Standards and practices, in contrast, are as immune from scrutiny as Star Chamber. They need not accord either due process or equal protection to their suppliants. So long as they keep the state at bay, they need not answer to political demands. Beyond that, they know only the demands of the market – of *their* market and no other. If they are fair, it is because it pays to be fair and not because fairness is a public virtue. If they respond to a political demand, it is because the political demand has become an economic demand and is having an economic consequence, not because they must agree or disagree or come to terms with a political position. Their only job is to respect the prejudices of their segment of the market, which they may do without any of the burdens of governing all the segments of the market.

In these ways network standards and practices divisions differ from employers enforcing Title VII's mandate. But they differ in another way as well. Title VII's mandate constitutes a kind of delegation of enforcement. Employers are enforcing law and know that they are enforcing law; they know they are acting on behalf of, and in fulfillment of the purposes of, the state. Standards-and-practices divisions relate to the state in a subtler, less obtrusive way. Standards-and-practices administrators believe that they are satisfying a market, not that they are doing the state's bidding. Nevertheless, the state is not entirely absent. It looms in the background: To fend off the state, networks must satisfy a demand for censorship that the state would undoubtedly make if the networks did not do the job instead. So standards-and-practices divisions are promoting a public purpose in all but name. One may wonder, however, if they are not also endangering a public purpose. Their censorship is harsher than state regulation under the constitutionally protected freedom of expression could ever be.

B. *Campus Speech Codes*

Standards-and-practices codes do have one enormous advantage: They allow Americans to hold on to a myth. They allow them to believe that they own a political culture in which the values of the First Amendment are paramount. By putting the suppression of hate speech under wraps, they permit Americans the conceit that their public discourse is freewheeling, no holds barred, a brawl. At least in the traditional media, it is not.[42] But myths are important, the myth of the First Amendment no less so than any other political origin myth. But there is another setting where Americans are not so shielded, where the constraints on discourse are overt and meant to be felt and understood as constraints.

Most colleges and universities in the United States have instituted what are in effect speech codes.[43] The codes contain rules governing what members of the college or university community may and may not say. Of course, Title VII applies to schools as employers of faculty and staff, and just like any other employer a school would be liable for tolerating the harassment of one of its employees by a co-employee or by a supervisor. But campus codes can (and many do) apply to everyone, student and employee alike.[44] They can threaten any member of the community who is accused of violating the code with discipline, including, in the extreme, expulsion from the community. Enforcement is not, in the first instance, in the hands of lawyers or courts – of trained legal personnel – but is the province of either the administration, or the faculty, or an elected council of students, or some mix of administration and faculty and students.

The purpose of the codes, broadly speaking, is to create an environment in which historically disadvantaged groups, as defined principally by race and gender, feel as free and as comfortable as historically advantaged groups to participate meaningfully in the educational and social life of the campus. The premise of the codes is that to achieve such an environment, university officials must impose restrictions on the speech of the historically advantaged.[45] The intellectual forebears of the codes thus wished to achieve actual equality and actual freedom under what they regarded as systemically unequal and factually unfree social conditions.[46]

The codes range widely in the speech they prohibit.[47] The narrower ones confine their prohibition to harassment. But even these can define harassment far more

[42] Compared with the print media and broadcast and cable, the Internet has provided an unruly forum in which hate speech can flourish. But the Internet too, just like broadcast and cable, has come under political pressure to self-regulate. *See* Jeanne Pia Mifsud Bonnici, *Self-Regulation in Cyberspace* (T.M.C. Asser Press 2008); Monroe E. Price and Stefaan G. Verhulst, *Self-Regulation and the Internet* (Kluwer Law International 2005). For an optimistic view of its capacity to do so, see David R. Johnson et al., "The Accountable Net: Peer Production of Internet Governance," 9 *Va. J. L. Tech.* 9 (2004), *reprinted with* "The Accountable Net Roundtable" as *Floersheimer Center Occasional Paper #2, available at* http://www.cardozo.yu.edu/floersheimer.

[43] We say "in effect" because some campuses forbid certain types of speech as constituting "verbal harassment" at the same time that they pride themselves on not having a speech code. Martin Golding cites Duke as an example. *See* Martin P. Golding, *Free Speech on Campus* 49 (Rowman & Littlefield Publishers 2000).

[44] Timothy Shiell argues that Title VII harassment regulations should apply to everyone on campus, because drawing a distinction between harassment against a college or university employee, who is entitled to the protections of Title VII, and a student, who is not, makes no sense. Timothy C. Shiell, *Campus Hate Speech on Trial* 105–11 (University Press of Kansas 1998).

[45] *See* Alan Charles Kors and Harvey A. Silverglate, *The Shadow University. The Betrayal of Liberty on America's Campuses* 96 (The Free Press 1998).

[46] The intellectual foundation for the regulation of speech in the interest of equality was laid by Herbert Marcuse in his essay "Repressive Tolerance," in Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse, *A Critique of Pure Tolerance* 81 (Beacon Press 1965). The application of Marcuse's vision to campus life was by Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," 17 *Harv. C.R.-C.L.L.R.* 133 (1982), Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 *Mich. L.R.* 2320 (1989); Charles R. Lawrence III, "If He Hollers, Let Him Go: Regulating Racist Speech on Campus," 1990 *Duke L.J.* 431 (1990); and Thomas C. Grey, "Discriminatory Harassment and Free Speech," 14 *Harv. J. L. & Pub. Pol'y* 157 (1991). *See also* Stanley Fish, *There's No Such Thing as Free Speech, and It's a Good Thing Too* (Oxford University Press 1994).

[47] The Foundation for Individual Rights in Education (FIRE) keeps tabs on campus speech codes around the country. Their Web site may be found at http://www.thefire.org/. Fundamental is the distinction between public and private colleges and universities: Public institutions are subject to First Amendment limitations, private institutions are not. Robert O'Neil argues that the distinction between public and private institutions is overstated. Most public institutions get the bulk of their funds from private sources – fund-raising, endowment, and tuition – and most private institutions get substantial support from the state. Some private institutions have or originally had public charters, and most are supervised to some degree by state licensing. Robert M. O'Neil, *Free Speech in the College Community* 218–39 (Indiana University Press 1997). FIRE's survey of campus speech codes supports O'Neil's argument. In 2010, policies violating First Amendment standards were found in 71% of public universities and 70% of private universities. FIRE, "Spotlight on Speech Codes 2010: The State of Free Speech on Our Nation's Campuses" (2010), *available at* http://www.thefire.org/public/pdfs/9aed4643c95e93299724a35023442ad6.pdf?direct

broadly than have the federal courts in the context of Title VII. For example, Duke University's Office for Institutional Equity states:

> Harassment of any individual for any reason is not acceptable at Duke University. Harassment may arise in situations unique to a given interpersonal relationship or in actions rooted in an attitude toward a group. Sexual harassment is perhaps the most commonly understood form of harassment but it is important to note that harassment on any demographic basis including age, color, disability, ethnic or national origin, gender, race, religion, class, institutional status, or sexual orientation or gender identity–also occurs and is expressly forbidden [48]

Title VII extends much more narrowly. It applies only to a discrete list of protected classes; the Duke policy applies to harassment on any basis, including three notably absent from the federal list. "class, institutional status, or sexual orientation or gender identity." Federal law also applies only to harassment of an individual *because* the individual is a member of a protected class; the Duke policy applies also to harassment of an individual for reasons arising out of "a given interpersonal relationship."

Indeed, the discrepancy is even greater than it seems. This is so for two reasons First, the campus adjudicator may attach a much less precise and therefore broader meaning to the words of the policy. The policy does, in fact, go on to define harassment in a way that would be familiar to any lawyer conversant with federal law.[49] But that definition, once in the hands of a panel of administrators, or faculty, or

[48] Duke University, "Harassment Policy and Procedures," *available at* http //www.duke.edu/web/equity/har_policy.htm Duke's policy does, however, require that the "policy against harassment shall be applied in a manner that protects the academic freedom and freedom of expression of all parties to a complaint." *Id.* It is therefore considered to be one of the more speech protective of such policies. Golding, *supra* note 43, at 88.

[49] Duke's policy provides:

> Harassment may take two forms
>
> The first form of harassment is verbal or physical conduct – which may or may not be sexual in nature – that, because of its severity and/or persistence, interferes significantly with an individual's work or education, or adversely affects an individual's living conditions.
>
> The second form of harassment occurs if a person uses a position of authority to engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when.
>
> - submission to such conduct is explicitly or implicitly made a term or condition of an individual's employment or education; or
> - submission to or rejection of such conduct is used as a basis for decisions affecting an individual's education or employment
>
> The conduct alleged to constitute harassment under this Policy shall be evaluated from the perspective of a reasonable person similarly situated to the complainant and in consideration of the context of the behavior.
>
> Harassment must be distinguished from behavior that, even though unpleasant or disconcerting, is appropriate to the carrying out of certain instructional, advisory, or supervisory responsibilities

students, or a mix of administrators and faculty and students, may have an operative meaning that is quite different from the operative meaning that federal judges attach to Title VII. This raises the second point. Colleges and universities are noticeably reticent to afford defendants in campus adjudications procedural protections that in federal and state courts are routine and necessary.[50] These include the right to counsel, the right to confront an accuser, the right to a trial record, the right to cross-examine hostile witnesses, and so forth. Procedure protects many interests. Among them is finding the truth. Denial of procedural protections makes it less likely that adjudication will result in truth, and therefore less likely that an accused can be confident that it will result in truth. Hence any subject of such a regime will be less concerned with ensuring that the truth in an adjudication will vindicate them than with avoiding adjudication altogether. A regime with procedural protections that punishes hate speech deters hate speech. A regime without procedural protections that punishes hate speech is in danger of deterring speech itself.[51]

Other codes are even broader in scope than Duke's Haverford College requires its students to draft and ratify an Honor Code each academic year. The code applies only to students and is administered only by students. Section 3.04(b) of the 2008–2009 code addresses "social concerns":

> Our social relationships should be based on mutual respect and concern. We must consider how our words and actions may affect the sense of acceptance essential to an individual's or group's participation in the community. We strive to foster an environment that genuinely encourages respectful expression of values rather than unproductive self-censorship. Upon encountering actions or values that we find degrading to ourselves and to others, we should feel comfortable initiating dialogue with the mutual goal of increasing our understanding of each other. The social concerns of the Code extend to all forms of communication, including, but not limited to· spoken discussion, posted writing, and internet discussion forums If a violation of the code occurs, it should be resolved via face to face confrontation.[52]

This paragraph is full of vague and difficult concepts. What is "mutual respect and concern"? When a student considers that his or her words and actions "may affect the sense of acceptance essential to an individual's or group's participation in the

Duke University, *supra* note 48

The major difference with federal law is that Duke's policy applies to "living conditions" as well as to the workplace. That is an obvious result of the difference in coverage. Otherwise, the language invites comparison with federal law.

[50] Kors and Silverglate, *supra* note 45, at 278, 289–311.

[51] For a pessimistic assessment of the prospects for academic freedom in the "postmodern" world, see Louis Menand, "The Limits of Academic Freedom," in *The Future of Academic Freedom* (Louis Menand, ed , University of Chicago Press 1996). For a different take, see Walter P Metzger, "A Stroll along the New Frontiers of Academic Freedom," in *Unfettered Expression: Freedom in American Intellectual Life* 91 (Peggie J Hollingsworth ed , University of Michigan Press 2000).

[52] The Honor Code: Article III of the Constitution of the Haverford College Students' Association, *available at* http.//www students haverford edu/code/honorcode2008.pdf.

community," must the student consider the subjective sense of acceptance of the *actual* fellow student, even if unreasonable and demanding, or is he entitled to consider the sense of acceptance of the *reasonable* fellow student? These are just the most obvious of a host of questions the paragraph poses.

But there is more. The very next section of the code, Section 3.05, has the following provision.

> As individuals who are also members of a community, we are obligated to examine our own actions as well as the actions of those around us in light of their effect on the community. If it becomes clear through self-reflection or through expressions of concern by others, that either our academic or social conduct represents a violation of community standards, we are obligated to report our own breach to Honor Council, even if doing so may result in a trial and the possibility of separation from the college.

Thus, if a student violates Section 3.04 of the code and is aware that he has violated Section 3.04, either because others have complained to him or because he has come to realize the violation on his own, that student has also violated Section 3.05 of the code if he fails to turn himself in to the Honor Council. He can be hauled before the Honor Council for that reason alone, just for failing to turn himself in, and punished just for that reason, quite apart from the predicate violation of Section 3.04. Any student can create a second violation of the Honor Code simply by complaining to the student who commits the predicate violation, and since Section 3.03(a) of the Honor Code requires students to engage in confrontation, any victim or potential victim must complain to the violator or potential violator lest he himself be in violation of the confrontation requirement.

Not every speech code in the United States circumscribes speech as narrowly as Duke's, not to mention Haverford's. Not every campus even has a code. But the vast majority do, and most circumscribe speech at least as narrowly as Duke's.[53] So it is fair to take Duke as representative of what passes for normative on campuses

[53] FIRE surveyed the 100 "Best National Universities" and the 50 "Best Liberal Arts Colleges" as rated in the 2008 "America's Best Colleges" issue of *U.S. News & World Report*. The report also surveyed 222 other major public universities. Of the 375 schools surveyed, FIRE declined to rate 8 schools on the grounds that the school stated clearly and consistently that it holds a set of values above a commitment to freedom of speech. FIRE rated the remaining 367 schools. It awarded schools either a "red light," a "yellow light," or a "green light." A "red light" school "has at least one policy that both clearly and substantially restricts freedom of speech." A "yellow light" school has policies "that could be interpreted to suppress protected speech or policies that, while restricting freedom of speech, restrict only narrow categories of speech." A "green light" indicates that FIRE has found "no policies that seriously imperil speech." FIRE, "Spotlight on Speech Codes 2010," *supra* note 47, at 5. FIRE gave a red-light rating to 266 schools (71%), it gave a yellow-light rating to 90 schools (24%), and a green light rating to 11 schools (3%). Eight schools (2%) stated clearly and consistently that they held some set of values above a commitment to freedom of speech. *Id.* at 6.

Of course, FIRE's ratings are evaluative and thus subject to dispute. Also FIRE makes no bones about its mission, to restore "individual rights" to higher education in the United States, rights which it considers sorely abused.

in the United States today. And what is normative on campuses far exceeds what is normative in other spheres of American life or what we have seen of the workplace and of network broadcasting.

III PATTERNS OF FREEDOM AND RESTRAINT

A. *Assessing the Three Regimes*

We can array the three institutions we have been considering – the workplace, standards-and-practices divisions in the broadcast media, and institutions of higher learning – along two axes: the breadth of the institution's circumscription of speech and the proximity of the institution to the tasks and interests of the state.

Of the three institutions, Title VII is the least restrictive. It condemns speech only when the speech rises to the level of harassment, and only when the harassment is because of membership in a limited number of specifically defined groups. It punishes the employer rather than the harasser. It punishes the employer only if the employer has not made reasonable efforts to prevent the harassment, and only when the harassment creates objectively unequal conditions of employment. Thus Title VII stops speech only by indirection, not by head-on attack. It can plausibly be described as not stopping speech at all, but rather preventing unequal working conditions. At the same time, of the three institutions, Title VII is the closest to the tasks and interests of the state. The employer that patrols the workplace for harassment is performing a task thrust on it by the state and knows that it is performing such a task. The state could perform that task directly, using the methods and facilities it uses to prevent countless other behaviors of which it disapproves. But the American state has chosen not to do that. It has chosen to distance itself from the prevention of harassment in the workplace by sharing the responsibility for prevention with the owner of the workplace. The sharing is overt, even if unadvertised. The employer knows that it has been entrusted with responsibility and makes sure that the employees know it. What Title VII accomplishes is to align the interests of the employer with the interests of the state. That is its purpose and its result.

Standards-and-practices codes circumscribe speech more broadly than does Title VII. The range of speech that a code may suppress is as broad as it needs to be to avoid offense to the market. What gives offense can vary widely, depending on the segment of the market to which the broadcaster pitches its programming. In approach, codes are always the same: Do not offend the market. In content – what exactly offends *this* broadcaster's market? – they will often be different. The codes labor under nothing like the conditions constraining Title VII. The broadcaster simply does what is in its interest and because it is in its interest. No legal finding of any sort is requisite. The broadcaster is not in the position of acting overtly and directly on behalf of the state. It is not restricting speech because the state has told it to restrict speech and is threatening it with harmful consequences if it does not. Instead it is the

market that is threatening the broadcaster with harmful consequences. And so it is that the broadcaster, unlike the employer, is not the state's partner. If anything, it is the market's partner, and it is as the market's partner that it must keep the state at bay. But that is the irony of its position: To keep the state at bay, the broadcaster must go at least partway to what it surmises the state would tell it to do were it not already doing it. The only way to avoid looming regulation may be to regulate yourself.[54] But self-regulation is no less regulation simply because the state stays in the background. It may, of course, be that the broadcaster's segment of the market is offended by exactly what offends the state, so that self-regulation is simply an expression of the broadcaster's self-interest. But it may also not be. The broadcaster's segment of the market need not be coincident with the will of the entire market expressed politically. Often enough it is. But sometimes it is not, and that is when the political will of the state makes itself felt. Or not – the broadcaster's regulation for the segment of a market may go way beyond what the state would ever require.

From one perspective, standards-and-practices codes appear to be utterly unconstrained. No constitution, no law of any kind, limits the topics over which they may range. So long as it pays minimal attention to the demand for censorship by the body politic as a whole, the broadcaster is free to censor or not to censor. But from another perspective, broadcasters are severely constrained. They are not free to censor or not to censor when it comes to the wishes of their segment of the market. Of course, their market may be indifferent to certain matters, and in those matters the managers of a broadcaster are free to indulge their collective whim. But they are free only because their market tolerates their freedom, only because their regulator leaves them free within certain limits for a certain time. They are in fact not free; they are constrained, not by the state, but by the very source of power that frees them from the state.

Colleges and universities in the United States, in contrast, are constrained neither by the market, which constrains broadcasters, nor by the state, which constrains employers. With respect to the speech they govern, they are their own source of power and impose their own limits on that power.[55] They are free, within a wide compass, to determine what speech is acceptable on campus and what speech is not, and they exercise this freedom to restrict a broad range of speech.

Thus a pattern appears. The more an institution is its own source of power vis-à-vis the state and the less it is influenced by it, the narrower that institution's constraint tends to be. To the degree that the motivation for constraining speech has its origin in interests and ideals apart from the state – in standards-and-practices divisions it is the

[54] "The willingness of an industry to regulate itself is often dependent on the belief that there is, as famously put in the securities-regulation context, a 'shotgun behind the door.'" Gideon Parchomovsky and Philip J. Weiser, "Beyond Fair Use," 96 *Cornell L. Rev.* 91, 135 (2010), quoting Walter Werner, "The SEC as a Market Regulator," 70 *Virginia L. Rev.* 755, 764 (1984).

[55] In theory, the Constitution of the United States constrains public universities in their ability to regulate speech, but in practice they behave as if they are unconstrained, and nothing the courts do seems to stop them. *See supra* note 47.

market; in higher education it is a vision of political decency and ideal citizenship – the constraint may be more vigorous. But even the workplace, the institution whose constraints on speech are the most closely linked to the state, suppresses speech more vigorously than the First Amendment would tolerate were the state carrying out the employer's task directly, and that is because the workplace, like the broadcast networks and higher education, has interests and ideals of its own, which share a platform with the interests and ideals expressed in Title VII. The pattern illustrates the two sides of the state. It threatens freedom and grants it.

B. *An American Model*

An American model emerges. It suppresses hate speech only incidentally, only as part of other purposes, not specifically and never by name. It relies primarily, if not exclusively, on the energies and ambitions of institutions within civil society, not on compulsion by the state. It does not make use of criminal law and all the moral, administrative, and political baggage that criminal law brings in train. It does not work throughout society as a whole; it works within the institutions – the workplace, broadcast networks, the campus – in which speech is most relevant. It reflects the interests, needs, and perspectives of those institutions, which mark and modulate any stance toward hate speech the institution may take or any effect on hate speech it may have. It is in every way opposite the countermodel, a model that suppresses hate speech directly just because it is hate speech, ignores civil society, uses criminal law exclusively, targets all of society, and rationally bends all efforts toward the suppression of hate speech and hate speech only.

What then of the other constitutional democracies? Do they supply the countermodel? Do they rely exclusively on the criminal sanction, on the state, for the suppression of hate speech? Do they ignore the astonishing force that civil society can bring to bear against the individual – the education, discipline, economic incentives, shunning, honoring – by which civil society achieves concord and conformity and against which criminal law appears as afterthought and as confession of failure?

The answer is that on the whole, with some exceptions, the other constitutional democracies do indeed supply the countermodel. Surely some surprises await in the data, but a look at three constitutional democracies – France, Germany, and Italy – shows a sturdy allegiance to the state-driven countermodel and a fairly uniform disregard of the American model, having nothing resembling the systemic, wholehearted, and largely voluntary American effort to discourage hate speech.

None of these countries have university speech codes. They certainly do not have individual codes adopted singly by universities, as in the United States. But they also do not have a state-mandated code applicable to all universities. Universities share the laws and regulations limiting speech of the population in general. However, nothing resembling the self-administered, locally generated speech codes that populate American campuses can be found. The absence of such codes makes perfect sense in the context within which the universities in these countries function. A

weak tradition of university self-management and the presence of highly specific statutes criminalizing hate speech make universities in these countries extraordinarily unpromising candidates for homespun, home run codes.

The results are similar for broadcast networks, with one modest exception. Neither France nor Germany has laws or codes limiting speech on broadcast networks. Italy has adopted a law limiting speech in radio and television broadcasting, but did so only in 2005. The law provides that no radio and television program shall violate fundamental rights of individuals, incite the audience to crime, violence, or intolerance, or harm children's physical and psychological development.[56] But this law is a *law*, an imposition by the state, not a network-by-network assessment of the market, resulting in network-specific and network-administered standards and practices codes. The law thus reflects no contribution from civil society, and the entwining of private purposes with a public purpose is the hallmark of the American model. The exception is that all major Italian broadcasting companies have adopted a code of conduct concerning television programming for juvenile viewers.

The results are similar for the workplace. It is true that the countries we are considering have more actively regulated workplace speech than speech in the broadcast media. That is because on June 29, 2000, the Council of the European Union adopted Directive 2000/43/EC "implementing the principle of equal treatment between persons irrespective of racial or ethnic origin," and on November 27, 2000, the Council adopted Directive 2000/78/EC "establishing a general framework for equal treatment in employment and occupation." These directives have been implemented throughout the EU – the workplace has more and more fallen under the jurisdiction of the EU. All its enactments follow the statist pattern.

IV CONCLUSION

Exploiting the resources of civil society is not logically inconsistent with the criminalization of hate speech. But criminalization is a statement about an orientation, a habit of mind, a judgment about what is politically desirable. It may be driven by fear – fear of another Holocaust, of revanchist and nationalistic atavisms – or it may be driven by political structures and traditions reaching back into the period of absolutist monarchy, a sense of what is the right way and what is the wrong way to set up a decent society. But it is not an accident, and it is not without consequence. The American way may, in fact, wind up suppressing more types of speech more effectively than occurs in the other constitutional democracies; having one's teachers and fellow students and employers and sources of news and entertainment all toeing a single line and vigilant against departures from the line can be a formidable deterrent to unwanted speech. That is the irony of the First Amendment. Routing

[56] Legislative Decree no 177, July 31, 2005, art. 4(1), Gazz Uff. n. 208 of Sept 7, 2005 A similar development in France On May 7, 2009, President Sarkozy asked a committee to draft a code for the mass media in France, but they have not yet issued a report

the suppression of hate speech through civil society rather than the state preserves the formal integrity of the First Amendment without having to pay the price levied by its substance, the hateful speech that it allows.

The criminal law brings a level of harshness and rigidity of control into society and social life, to which the softer and more flexible regulations that society comes up with in and of itself may seem preferable. But the general and universal standards that the state sets are, if not for any other reason than because of their universality and generality, more tolerant and liberal than the group-oriented, strata-oriented social restrictions that set much higher and more petty and rigid moral and social standards than the state ever would. Of course, the American tradition of not distinguishing too precisely between the public and the private sphere leads to smoother social regulations instead of harsher state regulations, but also to more rigid and petty moral and social norms than the more universal and tolerant norms of the state

In the end, however, these are not choices; we can no more choose our ethics and our politics than we can choose our genetic code. In the United States, recourse to civil society to achieve a certain political result seems natural and proper because in the United States, the boundary between the state and civil society is blurred and marked by countless interchanges. The three institutions we have been considering are the principal institutions in which this blurring of boundaries, this interchange between private and public, takes place. They form the "commanding heights" of a democratic public. Once the forces arrayed against hate speech have captured these institutions – the employers, the networks, the campus – they have effectively deprived hate speech of a meaningful public forum. They have turned the educative powers of these institutions against the First Amendment, at least against its position that hate speech ought not to be restrained. What is left for these forces to conquer? Where else is hate speech getting its purchase on the public?

These questions have answers The quarantining of hate speech by civil society in the United States is by no means perfect or complete. The Internet has made a hole – how large we do not yet know – in the fences that all constitutional democracies have erected against political atavism. Apart from that, the forums that hate speech musters in the United States are, by and large, not significant forums. This could change in a flash. Nothing guarantees that the tyranny of the majority[57] in the United States will continue to be directed against hate speech. The scientific point, however, remains valid: It is possible to regulate hate speech through the self-restraint of civil society as effectively as through the restraint of criminal law.

[57] As Tocqueville describes the political system of the United States, in which "the power of the majority [is] not just predominant but irresistible." 1 Alexis de Tocqueville, *Democracy in America* 284, 288 (Library of America 2004), *see generally id.* at Part II, chapter 7 ("On the Omnipotence of the Majority in the United States and its Effects").

13

Hate Speech in Constitutional Jurisprudence

A Comparative Analysis

Michel Rosenfeld

INTRODUCTION

Hate speech – that is, speech designed to promote hatred on the basis of race, religion, ethnicity, or national origin – poses vexing and complex problems for contemporary constitutional rights to freedom of expression.[1] The constitutional treatment of these problems, moreover, has been far from uniform as the boundaries between impermissible propagation of hatred and protected speech vary from one setting to the next. There is, however, a big divide between the United States and other western democracies. In the United States, hate speech is given wide constitutional protection, whereas under international human rights covenants[2] and in other western democracies, such as Canada,[3] Germany,[4] and the United Kingdom,[5] it is largely prohibited and subjected to criminal sanctions.

The contrasting approaches adopted by the United States and other western democracies afford a special opportunity to embark on a comparative analysis of the difficult problems posed by hate speech and of the various possible solutions to them. As we shall see, in the United States, hate speech and the best ways to cope with it are conceived differently than in most other western democracies. This is due, in part, to differences in social context, and, in part, to differences in approach. It may be tempting, therefore, to endorse a purely contextual approach to hate

[1] I use the term "constitutional rights" in a broad sense that encompasses both rights arising under national constitutions and those established by international human rights covenants, notwithstanding that, strictly speaking, the latter may be treaty-based rights rather than constitutional rights

[2] *See* discussion *infra* Section IV.

[3] *See* discussion *infra* Subsection IIIA

[4] *See* discussion *infra* Subsection IIIC

[5] *See* discussion *infra* Subsection IIIB

This chapter is drawn from Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence A Comparative Analysis," 24 *Cardozo L. Rev.* 1523 (2003)

speech encompassing a broad array of diverse constitutional responses ranging from American *laissez faire* to German vigilance Given the trend toward globalization and the instant transnational reach of the Internet, however, a purely contextual approach would seem insufficient, if not downright inadequate. For example, much neo-Nazi propaganda is now generated in California and transmitted through the Internet to countries like Canada or Germany where neo-Nazi groups have established a much more significant foothold than in the United States [6] Inasmuch as such propaganda generally amounts to protected speech in the United States, there seems to be little that can be done to limit its spread beyond American soil Does that justify calling for a change of constitutional jurisprudence in the United States? Or, more generally, do present circumstances warrant a systematic rethinking of constitutional approaches to hate speech?

In this chapter, I concentrate on these questions through a comparison of different existing constitutional approaches to hate speech. Before embarking on such a comparison, however, I provide in Section I a brief overview of some of the most salient issues surrounding the constitutional treatment of hate speech. In the next two sections, I examine the two principal contrasting constitutional approaches to hate speech Section II focuses on the United States and analyzes hate speech within the broader free speech jurisprudence under the American Constitution. Section III deals with the alternative approach developed in other western democracies, and Section IV details how the latter approach is incorporated in the relevant international covenants. Section V addresses the difficult problems raised by religion-based hate speech through a consideration of the Danish cartoons controversy. Finally, Section VI compares the two contrasting approaches and explores how best to deal with hate speech as a problem for contemporary constitutional jurisprudence.

I. HATE SPEECH AND FREEDOM OF EXPRESSION: ISSUES AND PROBLEMS

The regulation of hate speech is largely a post–World War II phenomenon.[7] Prompted by the obvious links between racist propaganda and the Holocaust, various

[6] *See* B'Nai B'Rith Anti-Defamation League, *The Skinhead International: A Worldwide Survey of Neo-Nazi Skinheads* (Irwin Suall ed., Anti-Defamation League 1995), Robert A Jordan, "Spreading Hatred," *Boston Globe*, Nov. 26, 1988, at 25; Paul Geitner, "Noting Neo-Nazi Material, Internet Blocks Site," *Chattanooga Times*, Jan. 27, 1996, at A8. *See also* UEJF & LICRA v Yahoo!, Inc. & Yahoo! France, T.G.I. Paris, May 22, 2000 (holding that the display and auction of Nazi paraphernalia over the Internet in France amounts to criminal violation, and is not protected speech). The French court's order that Yahoo! pay plaintiffs 10,000 Francs and make it impossible for French Internet users to view Nazi items on Yahoo's auction site was held unenforceable in the United States on First Amendment grounds. Yahoo!, Inc v La Ligue Contre le Racisme et L'Antisemitisme, 169 F Supp 2d 1181, 1186 (N D Cal 2001)
See Friedrich Kübler, "How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights," 27 *Hofstra L. Rev* 335, 336 (1998).

international covenants[8] as well as individual countries such as Germany[9] – and, in the decade immediately following the war, the United States[10] – excluded hate speech from the scope of constitutionally protected expression. Viewed from the particular perspective of a rejection of the Nazi experience and an attempt to prevent its resurgence, the suppression of hate speech seems both obvious and commendable.

Current encounters with hate speech, however, are for the most part far removed from the Nazi case. Whereas in Nazi Germany hate speech was perpetrated by the government as part of its official ideology and policy, in contemporary democracies, in spite of the increase of hate speech among more mainstream political and social actors in the aftermath of the 9/11 terrorist attacks, it is primarily opponents of the government and, in a majority of cases, members of marginalized groups with scant hope of achieving political power that engage in hate speech. Moreover, in some cases, those punished for engaging in hate speech have been members of groups long victimized by racist policies and rhetoric, prosecuted for uttering race-based invectives against those whom they perceive as their racist oppressors. Thus, for example, it is ironic that the first person convicted under the United Kingdom's Race Relations Law criminalizing hate speech was a black man who uttered a racial epithet against a white policeman.[11]

Like Nazi racist propaganda, some of the straightforward racist invectives heard today are crude and unambiguous. Contemporary hate speech cannot be confined, however, to racist insults. Precisely because of the strong post-Holocaust constraints against raw public expressions of racial hatred, present-day racists often feel compelled to couch their racist message in more subtle ways. For example, anti-Semites may engage in Holocaust denial or minimizing under the guise of weighing in on an ongoing historians' debate. Or they may attack Zionism to blur the boundaries between what might qualify as a genuine debate concerning political ideology and what is pure and simple anti-Semitism. Similarly, American racists have on occasion resorted to what appears to be a scientific debate or invoked certain statistics – such as those indicating that in the United States African Americans commit proportionately more crimes than whites – to promote their prejudices under the guise of formulating political positions informed by scientific fact or theory.

[8] *See, e.g.*, International Covenant on Civil and Political Rights, art. 20, ¶2, Mar. 23, 1976, 999 U.N.T.S. 171 ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").

[9] For a discussion of the extensive German regulation against hate speech, see Kübler, *supra* note 7, at 340–7.

[10] *See* Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding the constitutionality of a statute criminalizing group defamation based on race or religion). Although *Beauharnais* has never been formally repudiated by the Supreme Court, it is fundamentally inconsistent with more recent decisions. *See* discussion *infra* Section II.

[11] *See* Anthony Skillen, "Freedom of Speech," in *Contemporary Political Philosophy: Radical Studies* 139, 142 (Keith Graham ed., Cambridge University Press 1982).

Even these few observations suffice to establish that not all contemporary instances of hate speech are alike. Any assessment of whether, how, or how much hate speech ought to be prohibited, therefore, must account for certain key variables, namely *who* and *what* are involved and *where* and *under what circumstances* these cases arise.

The *who* is always plural, for it encompasses not only the speaker who utters a statement that constitutes hate speech, but also the target of that statement and the audience to whom the statement in question is addressed – which may be limited to the target, may include both the target and others, or may be limited to an audience that does not include any member of the target group.[12] Moreover, as already mentioned, not all speakers are alike. This is not only because of group affiliation. Thus, in the context of dominant majority group's hate speech against a vulnerable and discriminated-against minority, the impact of the hate speech in question is likely to differ significantly depending on whether it is uttered by a high government official or an important opposition leader, or whether it is propaganda by a marginalized outsider group with no credibility.[13] Furthermore, even the same speaker may have to be treated differently, or at least may have a different impact, which ought to be considered legally relevant, depending on who the target of his or her hate message is. Assuming, for the sake of argument, that black hate speech against whites in the United States is not the equivalent of white hate speech against blacks, what about black anti-Semitism? Ought it be considered as another (albeit inappropriate) instance of black response to white oppression?[14] Or as an assault against a vulnerable minority? In other words, is black anti-Semitism but one aspect

[12] The identity of the audience involved may be relevant for a variety of reasons, including assessing the harm produced by hate speech and devising effective legal means to combat hate speech. For example, demeaning racist propaganda aimed at a nontarget audience may be a necessary step in the creation of a political environment wherein policies of genocide might plausibly be implemented. *See generally* Gordon W. Allport, *The Nature of Prejudice* (Addison-Wesley Publishing Co. 1954). Thus, the German people might never have countenanced the Nazi policy of extermination of the Jews had they not been desensitized through years of vicious anti-Semitic propaganda. *See* Franklyn S. Haiman, *Speech and Law in a Free Society* 87 (University of Chicago Press 1981). Consistent with this, hate speech directed at a nontarget audience might well be much more dangerous than if exclusively addressed to a target-group audience.

From the standpoint of devising workable legal responses, the differences between different speakers and different target-group audiences may also be very important. For example, in the United States where hate groups like the neo-Nazis and the Ku Klux Klan are relatively marginalized and lack major financial means, allowing private tort suits by affected members of the relevant target groups may lead to expensive verdicts with crippling effects on the hate group's ability to function. *See* "Klansmen Sued over Shooting at S.C. Nightclub," *Atlanta J. Const.*, Nov. 1, 1998, at 6A (reporting crippling effect on Ku Klux Klan of a $37.8 million verdict over a church fire).

[13] For example, neo-Nazis in the United States are so marginalized and discredited that virtually no one believes that they pose any realistic danger. In contrast, a statement (better described as anti-Semitic rather than as hate speech) to the effect that the Jews have too much influence in the United States because they control the media – which is in part true – and the banks – which is patently false – uttered by the country's highest military official caused quite an uproar and led to his resignation. *See* Editorial, "Counting the Jews," *Nation*, Oct. 3, 1988, at 257.

[14] Because of prevailing social and economic circumstances, it has often been the case that the whites with whom black ghetto dwellers have the most – often unpleasant – contacts, namely shopkeepers

of a comprehensible resentment harbored by blacks against whites? Or is it but a means for blacks to carve out a common ground with white non-Jews by casting the Jews as the common enemy? And does it matter if the dangers of anti-Semitism prove greater than those of undifferentiated anti-white hatred?

The *what*, or message uttered in the context of hate speech, also matters and may or may not, depending on its form and content, call for sanction or suppression. Obvious hate speech such as that involving crude racist insults or invectives can be characterized as "hate speech in form." In contrast, utterances such as Holocaust denials or other coded messages that do not explicitly convey insults, but are nonetheless designed to convey hatred or contempt, may be referred to as "hate speech in substance." At first glance, it may seem easy to justify banning hate speech in form but not hate speech in substance. Indeed, in the context of the latter, there appear to be potentially daunting line-drawing problems, as the boundary between genuine scholarly, scientific, or political debate and the veiled promotion of racial hatred may not always be easy to draw. Moreover, even hate speech in form may not be used in a demeaning way warranting suppression [15]

Finally, *where* and *under what circumstances* hate speech is uttered also make a difference in terms of whether or not it should be prohibited. As already mentioned, "where" may make a difference depending on the country, society, or culture involved, which may justify flatly prohibiting all Nazi propaganda in Germany but not in the United States. "Where" may also matter within the same country or society. Thus, hate speech in an intracommunal setting may in some cases be less dangerous than if uttered in an intercommunal setting. Without minimizing the dangers of hate speech, it seems plausible to argue, for example, that hate speech directed against Germans at a Jewish community center comprising many Holocaust survivors, or a virulent antiwhite speech at an all-black social club in the United States, should not be subjected to the same sanctions as the very same utterance in an intercommunal setting, such as an open political rally in a town's central square.[16]

Circumstances also make a difference. For example, even if black hate speech against whites in the United States is deemed as pernicious as white hate speech against blacks, legal consequences arguably ought to differ depending on the circumstances. Thus, for example, black hate speech ought not be penalized – or at least not as much as otherwise – if it occurs in the course of a spontaneous reaction to a police shooting of an innocent black victim in a locality with widespread perceptions of racial bias within the police department.

More generally, which of the aforementioned differences ought to figure in the constitutional treatment of hate speech depends on the values sought to be promoted, on the perceived harms involved, and on the importance attributed to these harms. As already noted, the United States' approach to these issues differs markedly from those of other western democracies. Before embarking on a comparison of these contrasting approaches, however, it is necessary to specify two important points concerning the scope of the present inquiry: 1) there is no discussion of the advantages or disadvantages of various approaches to the regulation of hate speech, such as criminal versus civil liability; and 2) given that all the countries that are discussed in this chapter, including the United States, deny protection to hate speech that incites violence – or, to put it in terms of the relevant American jurisprudence, that poses "a clear and present danger"[17] of violence – what follows does not focus on such speech. Instead, the focus is on hate speech that incites racial hatred or hostility but that falls short of incitement to violence. Indeed, the key question is whether hate speech not likely to lead to immediate violence, but capable of producing more subtle and uncertain evils, albeit perhaps equally pernicious, ought to be suppressed or instead fought with more speech.

II. HATE SPEECH AND THE JURISPRUDENCE OF FREE SPEECH IN THE UNITED STATES

Freedom of speech is not only the most cherished American constitutional right, but also one of America's foremost cultural symbols.[18] Moreover, the prominence of free speech in the United States is due to many different factors, including a strong preference for liberty over equality, commitment to individualism, and a natural-rights tradition derived from Locke, which champions freedom from the state – or negative freedom – over freedom through the state – or positive freedom.[19] In essence, free-speech rights in the United States are conceived as belonging to the individual against the state, and they are enshrined in the First Amendment to the Constitution as a prohibition against government interference, rather than as the imposition of a positive duty on government to guarantee the receipt and transmission of ideas among its citizens.[20]

and landlords, happen to be Jews. *See* Vince Beiser, "Surviving The Rage in Harlem," *Jerusalem Rep.*, Feb 8, 1996, at 30.

15 For example, in the United States, the word 'nigger" is an insulting and demeaning word that is used to refer to a person who is black. When uttered by a white person to refer to a black person, it undoubtedly fits the label "hate speech in form." However, as used among blacks, it often is not at all hostile but instead connotes both intracommunal solidarity and implicit condemnation of white racism.

16 What accounts for their difference is that the oppressed are in a different position than the oppressors. Reaction by the oppressed, even if tinged with hatred, should therefore arguably be somewhat more tolerated than hate messages by members of traditionally oppressor groups

17 *See* Schenck v. United States, 249 U.S. 47 (1919).

18 *See* Lee C. Bollinger, *The Tolerant Society. Freedom of Speech and Extremist Speech in America* 7 (Oxford University Press 1986)

19 For a thorough discussion of the distinction between positive and negative liberty, see Isaiah Berlin, *Four Essays on Liberty* 118–72 (Oxford University Press 1969)

20 The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. 1

Even beyond hate speech, freedom of speech is a much more pervasive constitutional right in the United States than in most other constitutional democracies.[21] Indeed, Americans have a deep-seated belief in free speech as a virtually unlimited good and a strong fear that an active government in the area of speech will much more likely result in harm than in good. In spite of this, however, there have been significant discrepancies between theory and practice throughout the twentieth century, with the consequence that American protection of speech has been less extensive than official rhetoric or popular belief would lead one to believe. For example, although political speech has been widely recognized as the most worthy of protection,[22] for much of the twentieth century, laws aimed at suppressing or criminalizing socialist and communist views were routinely upheld as constitutional.[23] With respect to communist views, therefore, American protection of political speech has been more limited than that afforded by most other western democracies.

American theory and practice relating to free speech is ultimately complex and not always consistent. Accordingly, to better understand the American approach to hate speech – which has itself changed over time[24] – it must be briefly placed in its proper historical and theoretical context.

In the broadest terms, one can distinguish four different historical stages in which the perceived principal function of free speech saw significant changes. On the other hand, there have also been four principal philosophical justifications of free speech, which have informed or explained the relevant constitutional jurisprudence. Moreover, the philosophical justifications do not necessarily correspond to the historical stages, but rather intertwine and overlap with them. Nor do sharp boundaries separate the four historical stages, which run into each other and in which free speech fulfills various different functions. The principal marking point between these various stages is a shift in the *dominant* function of free speech. All this makes for a complex construct with a large number of possible permutations. Accordingly, only the broadest outlines of the historical and theoretical context of American free-speech jurisprudence will be considered in what follows.

Of the four historical stages of free speech, the first three have had definite – if often only implicit – influences on the Supreme Court's free-speech jurisprudence. In contrast, the fourth stage, which is much more recent, thus far has had little effect

[21] *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (involving a flag burning at the 1984 Republican National Convention in Dallas, Texas), Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (concerning a crude parody of a church leader); New York Times Co. v. United States, 403 U.S. 713 (1971) (involving the publication of classified diplomatic information susceptible of adversely affecting sensitive peace negotiations). In each case, the Supreme Court held that the expression involved was constitutionally protected.

[22] *See, e.g.*, Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper & Bros. 1948).

[23] *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Gitlow v. New York, 268 U.S. 652 (1925); Debs v. United States, 249 U.S. 211 (1919).

[24] *See infra* notes 45–70 and accompanying text.

on the judicial approach to free-speech issues, although it has already made a clear imprint on certain legislators and scholars.[25] The first of these historical stages dates back to the 1776 War of Independence against Britain, and establishes protection of the people against the government as the principal purpose of free speech.[26] Once democracy had become firmly entrenched in the United States, however, the principal threat to free speech came not from the government but from the "tyranny of the majority." Accordingly, in stage two, free speech was meant above all to protect proponents of unpopular views against the wrath of the majority.[27] Stage three, which roughly covers the period between the mid-1950s and the 1980s, corresponds to a period in the United States in which many believed that there had been an end to ideology,[28] resulting in a widespread consensus on essential values.[29] Stage three is thus marked by pervasive conformity, and the principal function of free speech shifts from lifting restraints on *speakers* to ensuring that *listeners* remain open-minded.[30] Finally, beginning in the 1980s with the rapid expansion of feminist theory, critical race theory, and other alternative discourses – all of which attacked mainstream and official speech as inherently oppressive, white-male-dominated discourse – there emerged a strong belief in the pluralization and fragmentation of discourse. Consistent with that belief, the principal role of free speech in stage four becomes the protection of oppressed and marginalized discourses and their proponents against the hegemonic tendencies of the discourses of the powerful.[31]

Of these four stages, stage three affords the greatest justification for toleration of hate speech,[32] whereas stage four provides the strongest case for its suppression – at least to the extent that it targets racial or religious minorities. Stages one and two do not provide clear-cut answers as the perceived evils of hate speech are likely to fluctuate depending on the circumstances. Assuming in stage one that hate speech is not promoted by government, the magnitude of the harms associated with it would depend on the degree of sympathy or revulsion it produces in official circles. In stage two, on the other hand, even if those who engage in hate speech constitute but a very small minority of the population, the danger posed by hate speech would depend on whether political majorities tend to agree with that speech's underlying message,

[25] An example of legislation consistent with stage four is the ordinance held unconstitutional in R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). For an example of scholarship informed by a stage-four perspective, see Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press 1993); Catherine A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987).

[26] *See* Bollinger, *supra* note 18, at 144.

[27] *Id.*

[28] *See, e.g.*, Daniel Bell, *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties* (The Free Press 1960).

[29] *See* Bollinger, *supra* note 18, at 143–4.

[30] *Id.*

[31] *See, e.g.*, Matsuda et al., *supra* note 25; Mackinnon, *supra* note 25.

[32] For an extended argument in favor of such toleration from a stage-three perspective, *see* Bollinger, *supra* note 18.

or whether they are seriously disturbed by it and firmly committed to combating the views it seeks to convey.

Assessment of how hate speech might fare under the four different historical stages is made much more difficult if the four main philosophical justifications for free speech in the United States are taken into proper account: the justification from democracy; the justification from social contract; the justification from the pursuit of the truth; and the justification from individual autonomy.[33] As we shall see, each of these justifications ascribes a different scope of legitimacy to free speech. Moreover, even different versions of the same justification lead to shifts in the boundaries between speech that requires protection and speech that may be constitutionally restricted, and such shifts are particularly important in the context of hate speech.

The justification from democracy is premised on the conviction that freedom of speech serves an indispensable function in the process of democratic self government.[34] Without the freedom to convey and receive ideas, citizens cannot successfully carry out the task of democratic self-government. Accordingly, political speech needs to be protected, but not necessarily all political speech.[35] If the paramount objective is the preservation and promotion of democracy, then antidemocratic speech in general, and hate and political extremist speech in particular, would in all likelihood serve no useful purpose, and would therefore not warrant protection.[36]

The justification from social contract theory is in many ways similar to that from democracy, but the two do not necessarily call for protection of the same speech. Unlike the other three justifications, that from social contract theory is essentially procedural. Its premise is that political institutions must be justifiable in terms of an actual or hypothetical agreement among all members of the relevant society,[37] and significant changes in those institutions must be made only through such agreements. The necessary "consent of the governed" is meaningful, however, only if fully informed; rational social contractors would not consent to a regime that made its own decisions about what information they receive. Just as with justification from democracy, then, here too there is a need for free exchange and discussion of ideas. Unlike the justification from democracy, however, the social contract justification

[33] For an extensive discussion of philosophical justifications of free speech that both overlaps with, and differs from, the present discussion, see Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982).

[34] The principal exponent of this view was Alexander Meiklejohn. *See* Meiklejohn, *supra* note 22.

[35] Meiklejohn himself had a broad view of political speech and advocated extensive protection of it.

[36] It is, of course, possible to maintain that toleration of extremist antidemocratic speech would tend to invigorate the proponents of democracy and hence ultimately strengthen rather than weaken democracy. Be that as it may, toleration of antidemocratic views is not logically required for purposes of advancing self-governing democracy. For example, advocacy of violent overthrow of democratically elected government and establishment of a dictatorship need not be protected to ensure vigorous debate on all plausible alternatives consistent with democracy.

[37] *See, e.g.*, John Rawls, *A Theory of Justice* 11–12 (Belknap Press of Harvard University Press 1971).

cannot permit *ex ante* exclusion of any views that, even though incompatible with democracy, might be relevant to a social contractor's decision to embrace the polity's fundamental institutions or to agree to any particular form of political organization. Accordingly, the justification from social contract seems to require some tolerance of hate speech, if not in form then at least in substance.

The justification from the pursuit of the truth originates in the utilitarian philosophy of John Stuart Mill. According to Mill, the discovery of truth is an incremental empirical process that relies on trial and error and requires uninhibited discussion.[38] Mill's justification for very broad freedom of expression was imported into American constitutional jurisprudence by Justice Oliver Wendell Holmes and became known as the justification based on the free marketplace of ideas.[39] This justification, which has been dominant in the United States ever since,[40] is premised on the firm belief that truth is more likely to prevail through open discussion (even if such discussion temporarily unwittingly promotes falsehoods) than through any other means bent on eradicating falsehoods outright.

Mill's strong endorsement of free speech was rooted in his optimistic belief in social progress. According to his view, truth would always ultimately best falsehood so long as discussion remained possible, and hence even potentially harmful speech should be tolerated as its potential evils could best be minimized through open debate. Accordingly, Mill advocated protection of all speech so long as it falls short of incitement to violence.

Although Holmes's *justification* of free expression is very similar to Mill's, his *reasons* for embracing the free marketplace of ideas differ. Unlike Mill, Holmes was driven by skepticism and pessimism and expressed grave doubts about the possibility of truth. Because of this, Holmes justified his free-marketplace approach on pragmatic grounds. Given that most strongly held views eventually prove false, any limitation on speech is most likely grounded in false ideas. Accordingly, Holmes was convinced that a free marketplace of ideas was likely to reduce harm in two distinct ways. It would lower the possibility that expression would be needlessly suppressed based on falsehoods; and it would encourage most people who tend stubbornly to hold on to harmful or worthless ideas to develop a healthy measure of self-doubt.[41]

Like Mill, Holmes did not endorse unlimited freedom of speech. For Holmes, speech should be protected unless it poses a "clear and present danger" to people, such as falsely shouting "fire" in a crowded theater and thereby causing panic.[42] Both Mill's and Holmes's justification from the pursuit of truth justify protection

[38] *See* John Stuart Mill, *On Liberty and Other Essays* (John Gray ed., Oxford University Press 1998) (1859).

[39] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[40] *See* Schauer, *supra* note 33, at 15–16.

[41] *See* Abrams, 250 U.S. at 630.

[42] *See* Schenck v. United States, 249 U.S. 47 (1919).

of hate speech that does not amount to incitement to violence. Indeed speech amounting to an "incitement to violence" is but one instance of speech that poses a "clear and present danger." In the end, whether speech incites to violence or creates another type of clear and present danger, it does not deserve protection – under the justification from the pursuit of truth – because it is much more likely to lead to harmful action than to more speech, and hence it undermines the functioning of the marketplace of ideas.

In the end, Mill and Holmes represent two sides of the same coin Mill overestimates the potential of rational discussion whereas Holmes underestimates the potential for serious harm of certain types of speech that fall short of the clear and present danger test. The justification from the pursuit of truth is, at its bottom, pragmatic. As we shall see later in the chapter, however, because both the Millian and Holmesian pragmatic reasons for the toleration of hate speech are based on dubious factual claims, they may in the end undermine rather than bolster any pragmatic justification of tolerance of hate speech that falls short of incitement to violence.[43]

Unlike the three preceding justifications, which are collective in nature, the fourth justification for free speech – that from autonomy is primarily individual-regarding. Democracy, social peace and harmony through the social contract, and pursuit of the truth are collective goods designed to benefit society as a whole In contrast, individual autonomy and well-being through self-expression are presumably always of benefit to the individual concerned, without in many cases necessarily producing any further societal good.

The justification from autonomy is based on the conviction that individual autonomy and respect require protection of virtually unconstrained self-expression.[44] Accordingly, all kinds of utterances arguably linked to an individual's felt need for self-expression ought to be afforded constitutional protection. Consistent with this, the justification from autonomy clearly affords the broadest scope of protection for all types of speech.

As originally conceived, the justification from autonomy seemed exclusively concerned with the self-expression needs of speakers. Given that hate speech plausibly could contribute to the fulfillment of the self-expression needs of its proponents, it would seem to qualify for protection under the justification from autonomy.

Under a less individualistic – or at least less atomistic conception of autonomy and self-respect, however, focusing exclusively on the standpoint of the speaker would seem insufficient. Indeed, if autonomy and self-respect are considered from the standpoint of listeners, then hate speech may well loom as prone to undermining

[43] For an extended critique of the use of pragmatism to justify free-speech protection of hate speech that does not pose a clear and present danger of violence, see Michel Rosenfeld, *Just Interpretations: Law Between Ethics and Politics* 150–96 (University of California Press 1998).

[44] See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), David A. J. Richards, "Free Speech and Obscenity Law Toward a Moral Theory of the First Amendment," 123 *U Pa L Rev.* 45 (1975)

the autonomy and self-respect of those whom it targets. This last observation becomes that much more urgent under a stage-four conception of the nature and scope of legitimate regulation of speech. Indeed, if the main threat of unconstrained speech is the hegemony of dominant discourses at the expense of the discourses of oppressed minorities, then self-expression of the powerful threatens the autonomy of those whose voices are being drowned, and hate speech against the latter can only exacerbate their humiliation and the denial of their dignity and autonomy.

As these last observations indicate, the possible intersections between the four historical stages and the four philosophical justifications are multiple and complex. Current American constitutional jurisprudence concerning hate speech, however, relies by and large on the justification from the pursuit of truth and tends to espouse implicitly a stage-three – or a combination of stage two and stage three – vision on the proper role of speech.

Judicial treatment of hate speech in the United States is of relatively recent vintage. Indeed, nearly sixty years ago, in *Beauharnais v. Illinois*,[45] the Supreme Court upheld a conviction for hate speech emphasizing that such speech amounted to group defamation, and reasoning that such defamation was in all relevant respects analogous to individual defamation, which had traditionally been excluded from free-speech protection. Beauharnais, a white supremacist, had distributed a leaflet accusing blacks of, among other things, rape, robbery, and other violent crimes. Although Beauharnais had urged whites to unite and protect themselves against the evils he attributed to blacks, he had not been found to have posed a "clear and present danger" of violence.

Beauharnais has never been explicitly repudiated, but it has been thoroughly undermined by subsequent decisions. Already the dissenting opinions in *Beauharnais* attacked the Court's majority's rationale by stressing that both the libel and the "fighting words"[46] exceptions to free speech involved utterances addressed to individuals, and were hence unlikely to have any significant impact on public debate. In contrast, group libel was a public, not private, matter and its prohibition would inhibit public debate.

The current constitutional standard, which draws the line at incitement to violence, was established in the 1969 *Brandenburg v. Ohio*[47] decision. *Brandenburg* involved a leader and several members of the Ku Klux Klan who in a rally staged for television (in front of only a few reporters) made several derogatory remarks mainly against blacks, but also some against Jews. In addition, while not threatening any imminent or direct violence, the speakers suggested that blacks should return to Africa and Jews to Israel, and announced that they would petition the government

[45] 343 U.S 250 (1952)

[46] In Chaplinsky v. New Hampshire, 315 U.S 568, 572 (1942), the Supreme Court held that insults addressed to an individual that were so offensive as to readily prompt a violent reaction did not fall within the ambit of constitutionally protected speech.

[47] 395 U.S 444 (1969).

to act, but that if it refused they would have no other recourse than to take matters in their own hands. Selected portions of this rally were later broadcast on local and national television.

The Supreme Court in a unanimous decision set aside Brandenburg's criminal conviction, concluding that the Klan may have *advocated* violence but had not *incited* it. Significantly, in drawing the line between incitement and advocacy, the Court applied to hate speech a standard it had recently established to deal with communist speech involving advocacy of the forcible overthrow of the government.[48] In so doing, the Court's decision raises a question that remains beyond the scope of the present undertaking, namely whether hate speech ought to be equated with (politically) extremist speech.

If one case has come to symbolize the contemporary political and constitutional response to hate speech in the United States, it is the *Skokie* case from the late 1970s. This case arose out of a proposed march by neo-Nazis in full SS uniform with swastikas through Skokie, a suburb of Chicago with a large Jewish population, including thousands of Holocaust survivors. The local municipal authorities took measures – including enacting new legislation – designed to prevent the march, but both state and federal courts eventually invalidated the measures as violating the neo-Nazis' free speech rights.[49]

The neo-Nazis made it clear that they chose Skokie for the march precisely to upset Jews through a direct confrontation with their message. The constitutional battle focused on whether the proposed march in Skokie would amount to an "incitement to violence." Based on the testimony of Holocaust survivors residing in Skokie, who asserted that exposure to the swastika might provoke them to violence, a lower state court determined that such a march could be prohibited.[50]

That appellate court reversed, finding that the proposed march had not met the "incitement to violence" requirement.[51] While acknowledging the intensity of the likely feelings of Holocaust survivors, the court held that they were not a sufficient ground on which to prohibit the proposed march.[52] The court did not specify what standard would have to be met to justify banning the display of the swastika. What if a Jew who was not a Holocaust survivor had testified that a neo-Nazi march with a swastika would have moved him to violence? What if a gentile had thus testified?

These uncertainties illustrate some of the difficulties associated with the "incitement to violence" standard, even if one assumes that it is the right standard. Be that as it may, the Skokie controversy ultimately fizzled. After their legal victories, the

[48] *See* Yates v. United States, 354 U.S. 298 (1957) (holding conviction for mere advocacy unconstitutional).

[49] *See* Smith v. Collin, 436 U.S. 953 (1978), Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).

[50] Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978).

[51] *Id.* at 24.

[52] *See id.*

neo-Nazis decided not to march in Skokie. Instead, they marched in Chicago, far from any Jewish neighborhood.[53] Because of their very marginality, and because they had no sway over the larger nontarget audience in the United States, the actual march by the neo-Nazis did much more to showcase their isolation and impotence than to advance their cause. Under those circumstances, allowing them to express their hate message probably contributed more to discrediting them than would have a judicial prohibition against their march.

Because of contextual factors prevalent in the United States during the late 1970s, the result in the *Skokie* case may appear to be pragmatically justified and to fit within a stage-three conception of free speech.[54] Indeed, inasmuch as the neo-Nazi message had no appeal, and reminded its listeners of past horrors as well as of the fact that the United States had to go to war against Hitler's Germany, it could conceivably be analogized to a vaccine against total complacency. Moreover, by the very falsehood of its ring, the utterance of the neo-Nazi message could well be interpreted as reinforcing the belief in a need for virtually unlimited free speech associated with the justification from the pursuit of the truth.[55]

Even if the *Skokie* case was rightly decided, the constitutional jurisprudence it helped shape has proved quite troubling when applied under less favorable circumstances. This conclusion becomes manifest from a consideration of two cases involving cross burning. The first of these, *R.A.V. v. City of St. Paul*,[56] concerned the burning of a cross inside the fenced yard of a black family by young white extremists.[57] The latter were convicted under a local criminal ordinance, which provided in relevant part that:

> Whoever places on public or private property a symbol, object, . . . but not limited to, a burning cross or Nazi swastika, which one knows . . . arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct . . .[58]

In a unanimous decision, the U.S. Supreme Court reversed the conviction, holding the ordinance unconstitutional for two principal reasons. First, it targeted speech that would not amount to an incitement to violence. Second, even on the

[53] *See* Smith v. Collin, 439 U.S. 916 (1978) (Blackmun, J., dissenting from denial of certiorari).

[54] For an extended argument in support of the judicial handling of the *Skokie* case within the scope of a stage three conception, *see* Bollinger, *supra* note 18.

[55] It is significant, consistent with these observations, that Jews were on both sides of the Skokie controversy, as civil rights organizations defended the Neo-Nazis' right to speak. For a further analysis of this fact, see Michel Rosenfeld, "Extremist Speech and the Paradox of Tolerance," 100 *Harv. L. Rev.* 1457, 1487 (1987) (book review).

[56] 505 U.S. 377 (1992).

[57] The burning of a cross, long a practice of white supremacists, such as those belonging to the Ku Klux Klan, has been a symbol of virulent racism much like the display of the swastika has been associated with virulent anti-Semitism.

[58] St. Paul Bias-Motivated Crime Ordinance (1990), *quoted in* R.A.V., 505 U.S. at 380.

assumption that a burning cross qualified as unprotected "fighting words," by criminalizing some incitements but not others, the ordinance was based on impermissible viewpoint discrimination: Whereas the ordinance criminalized expression likely to incite violence on the basis of race or religion, it did not criminalize similar expression equally likely to incite violence on other bases, such as homosexuality.

Because of the pervasive nature of racism and the long history of oppression and violence against blacks in the United States, and given the frightening associations evoked by burning crosses, the situation in *R.A.V.* cannot be equated with that involved in the *Skokie* case. Of course, swastikas tend to inspire as much fear and anger in Jews as burning crosses do in blacks. The major difference between the *Skokie* case and *R.A.V.*, however, has to do not with the perniciousness of the respective symbols involved, but with the different factual and emotional impact of these symbols on the target and nontarget audiences before whom they were meant to be displayed.

Significantly, the Holocaust survivors who testified that the proposed neo-Nazi march in Skokie would lead them to violence emphasized that their reaction would be triggered by memories of the past. Moreover, although there was some anti-Semitism in the United States in the 1970s, the small, fringe neo-Nazis were so discredited that it seemed most unlikely that they would in any way, directly or indirectly, advance the cause of anti-Semitism.[59] In contrast, cross burning produced fears not only concerning the past but also the present and the future, and not based on events that had taken place across an ocean, but on events that had marked the sad history of race relations in the United States from the founding of the republic. Indeed, the cross burning in *R.A.V.* occurred in a racially mixed neighborhood, in an era in which several homes of black persons who had moved into white neighborhoods had been burned in efforts to dissuade members of a growing black middle class from moving into white neighborhoods.[60]

In sum, even though both the proposed march in *Skokie* and the cross burning in *R.A.V.* were meant to incite hatred on the basis of religion and race, respectively, their effects were quite different. The events surrounding *Skokie* mainly produced contempt for the marchers and a reminder that there was little danger of an embrace of Nazism in the United States. *R.A.V.*, on the other hand, played on pervasive, and to a significant degree justified, fears concerning race relations in America. Undoubtedly, cross burning itself is rejected as repugnant by the vast majority of

[59] This last observation may no longer hold true in view of certain more recent events, which have increased the profile of white supremacist extremists. For example, several children were shot at a Jewish day-care center in Los Angeles. *See* Terry McDermott, "Panic Pierces Illusion of Safety," *L.A. Times*, Aug. 11, 1999, at A1. In Chicago, a white supremacist went on a shooting spree that included the firing of many shots that did not cause any injuries near a synagogue. *See* "Suspect in Racial Shootings Had a Troubled Past," *Chron. of Higher Educ.*, July 16, 1999, at A8. During that same spree, however, that individual killed both a black and Asian person. *Id.*

[60] *See, e.g.*, "Second Racial Attack in Two Weeks," UPI, Nov. 20, 1984, Tuesday, AM Cycle; [untitled], UPI, Feb. 18, 1997, LEXIS, Nexis, Library, UPI File.

Americans. The underlying racism associated with it and the message that blacks should remain in their own segregated neighborhoods, however, unfortunately still have adherents among a non negligible portion of whites in America.

The ultimate difference between the impact of the hate speech in *Skokie* and that in *R.A.V.* relates to the emotional reactions of the respective target and nontarget audiences involved. In *Skokie*, the vast majority of Jews felt no genuine present or future threat whereas the nontarget gentile audience felt mainly contempt and hostility toward the Nazi hate message. In *R.A.V.*, however, the target audience definitely experienced anger, fear, and concern, whereas the nontarget audience was split along a spectrum spanning from revulsion to mixed emotions to downright sympathy for the substance of the hate message if not for its form.

This latter conclusion is buttressed by a consideration of *Virginia v. Black*, decided by a divided U.S. Supreme Court in 2003,[61] which involved two cross-burning incidents, one at a Ku Klux Klan rally, the other by whites not affiliated with the Klan in the yard of an African-American neighbor. This second cross-burning case clearly illustrates that the fear, panic, and terror experienced by African Americans confronted with cross burnings is of an entirely different order of magnitude than the anger and revulsion experienced by American Holocaust survivors upon exposure to the Nazi military uniform and swastika worn by homegrown neo-Nazis. Furthermore, whereas *Black* formally adhered to the U.S. doctrinal approach, it also underscores the arbitrariness of drawing a bright line between incitement to hatred and incitement to violence in a context as marked by violence, injustice, and oppression as that of the historical relationship between whites and blacks in the United States.

The Virginia statute at stake in *Black* criminalized the burning of a cross with the intent to intimidate, and specified that the very act of burning amounted to *prima facie* intent to intimidate.[62] The Court held that criminalizing cross burning with an intent to intimidate was constitutional, but that drawing a *prima facie* inference that burning a cross evinced an intent to intimidate was unconstitutional. As an intent to intimidate need not entail an intent to cause violence – one may intimidate through threats of humiliation, exposure to ridicule, social ostracism, job loss, and so forth – it may seem, at first, that the Court in *Black* had deviated from its incitement to violence standard. This is dispelled, however, by Justice O'Connor who, in writing for the Court, noted that throughout the history of the Ku Klux Klan, "cross-burnings have been used to communicate . . . threats of violence. . . ."[63] Indeed, as cross burnings have frequently been followed by beatings, lynchings, shootings, and killings of African Americans, they either amount to incitements to violence or they create a reasonable fear in those who they target of becoming victims of impending violence.

[61] 538 U.S. 343 (2003).

[62] *Id.* at 348.

[63] *Id.* at 354.

Because of the particular historical context, the Ku Klux Klan's incitement to hatred seems inextricably intertwined with incitement to violence. But even in the case of the Klan, incitement to hatred cannot be simply equated with, or treated automatically as the cause of, incitement to violence. Significantly, the Klan rally at stake in *Black* involved a reunion among hooded members of the group for a ritualistic cross burning accompanied by the group's customary vicious rhetoric of extreme racial hatred The rally in question was not meant for outsiders, being held on private property with the full accord of the owner, and only running afoul of the authorities because witnessed by a passing sheriff on a nearby road.[64] Moreover, this preaching of hatred among the converted, centered on a cross burning, amounted to communication of what Justice O'Connor characterized as "potent symbols of shared group identity and ideology."[65] As such, the particular cross burning at issue was adjudged by the Court to amount to constitutionally protected speech.

Concerning the cross burning by whites not members of the Klan in the yard of an African-American neighbor, on the other hand, the surrounding circumstances suggest an intent to intimidate,[66] as well as the use of means designed to convey a message of racial hatred [67] It is by no means clear, however, that either the cross burners or their intended target had imminent violence in mind. Just as likely, consistent with the circumstances of the case, intimidation was meant to deter further complaints by the target to the police similar to a previous one regarding the shooting of firearms in the cross burner's own yard,[68] or was intended to prompt the targeted victim to leave the neighborhood to which he had moved recently,[69] based on race-based hostility perpetrated by his neighbors.

Whereas the confluence of incitement to hatred and incitement to violence stressed by the Court seems highly artificial in the context of *Black*, the continuum between the two is vividly illustrated in that case. Accordingly, in contexts in which such continuum is not trivial, in which violence follows often enough, but by no means always, messages of hatred, and in which the time span between the communication of hatred and the triggering of violence can often develop over an extended period of time, it would seem that the incitement-to-violence standard would fall short for purposes of achieving the aims entrusted to it by its proponents

[64] *Id.* at 348.

[65] *Id* at 356

[66] Whereas the U.S. Supreme Court held that the *prima facie* inference of intent to intimidate involved in the trial of both cross burnings was unconstitutional, the relevant facts as recounted by the Court nevertheless seem consistent with an intent to intimidate, *see id.* at 350–3, and will be treated as such for the purpose of the present analysis

[67] It is highly relevant in this respect that the neighbor of the targeted victim who was involved in the cross burning on the latter's yard had previously shot firearms in his own adjacent yard, thus disturbing, if not intimidating, his would-be victim *See id.* at 350. Had the cross burner chosen instead to shoot a firearm to frighten his targeted neighbor, that might have been as intimidating as cross burning, but it would have not necessarily involved any communication of racial hatred

[68] *See id.* at 350.

[69] *Id*

By the same token, the Court's conclusion that the Klan's cross-burning rally in *Black* amounted to a constitutionally protected sharing of ideology also looms as shortsighted. Assuming the continuum described earlier, even preaching exclusively among the converted – including advocating violence as one speaker declared that "he would love to take a [gun] and just randomly shoot the blacks"[70] – seems closely woven together with the real possibility of subsequent intimidation and violence As Klan members are predisposed by their ideology to contemplate perpetrating violence motivated by racial hatred, the ritualistic convening involving cross burning seem particularly apt to whip up the emotions, to exacerbate the hatred, and to dispel any lingering inhibitions to turn the shared hatred into violence. Again, the turn to violence may not be immediate, but the history of the Klan as outlined in Justice O'Connor's opinion in *Black* provides ample evidence of a multifaceted yet closely integrated cycle involving rallying the troops, intimidating the targets, and perpetrating various forms of violence against the latter. Finally, the Klan rally in *Black* appears to have only included those already converted to the cause. But what if it had also been intended for a nontarget audience of whites? Should that have been deemed a constitutionally protected attempt to spread ideology? Or, given the broader context carved out by the Klan's history, an effort to recruit more soldiers for the Klan's campaign of hatred and violence?

III. THE TREATMENT OF HATE SPEECH IN THE CONSTITUTIONAL JURISPRUDENCE OF OTHER WESTERN DEMOCRACIES

Whereas free speech in the United States is shaped above all by individualism and libertarianism, collective concerns and other values such as honor and dignity lie at the heart of the conceptions of free speech that originate in international covenants and in the constitutional jurisprudence of other western democracies. Thus, for example, Canadian constitutional jurisprudence is more concerned with multicultural ism and group-regarding equality [71] For its part, the German constitution sets the inviolability of human dignity as its paramount value[72] and specifically limits freedom of expression to the extent necessary to protect the young and the right to personal honor.[73]

These differences have had a profound impact on the treatment of hate speech. To better appreciate this, I briefly focus on salient developments in three countries: Canada, the United Kingdom, and Germany. In addition, I briefly consider the

[70] *Id* at 349.

[71] *See* Kathleen Mahoney, "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography," 55 *Law & Contemp. Probs* 77 (1992).

[72] Grundgesetz [GG] art. 1 (F.R.G.), *translated in The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law With a Translation of the Basic Law* 227 (Ulrich Karpen ed., Nomos 1988).

[73] *Id.* art. 5(2)

paradoxical case of Hungary, a country that in context and culture seems much closer to Germany, but that has nonetheless developed a hate-speech jurisprudence much like that of the United States.

A *Canada*

It is particularly interesting to start with the contrast between the United States and Canada, neighboring countries that both were once British colonies and now are advanced industrialized democracies with large immigrant populations with roots in a vast array of countries and cultures. Moreover, although Canada has produced a constitutional jurisprudence that is clearly distinct from that of the United States, the Canadian Supreme Court has displayed great familiarity with American jurisprudence.[74]

Although both the United States and Canada are multiethnic and multicultural polities, the United States has embraced an assimilationalist ideal symbolized by the metaphor of the "melting pot," whereas Canada has placed greater emphasis on cultural diversity and has promoted the ideal of an "ethnic mosaic."[75] Consistent with this difference, the Canadian Supreme Court has explicitly refused to follow the American approach to hate speech. In a closely divided decision, the Canadian Court upheld the criminal conviction of a high school teacher who had communicated anti-Semitic propaganda to his pupils in the leading case of *Regina v Keegstra*.[76]

Keegstra told his pupils that Jews were "treacherous," "subversive," "sadistic," "money loving," "power hungry," and "child killers." He went on to say that the Jews "created the Holocaust to gain sympathy." He concluded that Jews were inherently evil and expected his students to reproduce his teachings on their exams to avoid bad grades.[77] The criminal statute under which Keegstra had been convicted prohibited the willful promotion of hatred against a group identifiable on the basis of color, race, religion, or ethnic origin.[78] The statute in question made no reference to incitement to violence, nor was there any evidence that Keegstra had any intent to lead his pupils to violence.

In examining the constitutionality of Keegstra's conviction, the Canadian Supreme Court referred to the following concerns as providing support for freedom of expression under the Canadian Charter.

> (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.[79]

Thus, the Canadian protection of freedom of expression, like the American one, relies on the justifications from democracy, from the pursuit of truth, and from autonomy. The Canadian conception of autonomy, however, is less individualistic than its American counterpart, as it seemingly places equal emphasis on the autonomy of listeners and speakers.

In spite of these affinities, the Canadian Supreme Court refused to follow the American lead and draw the line at incitement to violence. Stressing the Canadian Constitution's commitment to multicultural diversity, group identity, human dignity, and equality,[80] the Court adopted a nuanced approach designed to harmonize these values with freedom of expression. Based on this approach, the Court concluded that hate propaganda such as that promoted by Keegstra did not warrant protection as it did more to undermine mutual respect among diverse racial, religious, and cultural groups in Canada than to promote any genuine expression needs or values.

In reaching its conclusion, the Canadian Court considered the likely impact of hate propaganda on both the target-group and on nontarget-group audiences. Members of the target group are likely to be degraded and humiliated, to experience injuries to their sense of self worth and acceptance in the larger society, and may as a consequence avoid contact with members of other groups within the polity.[81] Those who are not members of the target group, or society at large, on the other hand, may become gradually desensitized and may in the long run become accepting of messages of racial or religious inferiority.[82]

Not only does the Canadian approach to hate speech focus on gradual long term effects likely to pose serious threats to social cohesion rather than merely on immediate threats to violence, but it also departs from its American counterpart in its assessment of the likely effects of speech. Contrary to the American assumption that truth will ultimately prevail, or that speech alone may not lead to truth but is unlikely to produce serious harm, the Canadian Supreme Court is mindful that hate propaganda can lead to great harm by bypassing reason and playing on the emotions. In support of this, the Court cited approvingly the following observations contained in a study conducted by a committee of the Canadian Parliament:

> The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is

[74] One example is the thorough discussion of American decisions and rejection of the American approach in the majority opinion in Canada's leading hate speech case, Regina v. Keegstra, [1990] 3 S.C.R. 697

[75] *See* Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 14 (Oxford University Press 1995)

[76] [1990] 3 S.C.R. 687.

[77] *See id.* at 714.

[78] *See id.* at 713.

[79] *Id.* at 728

[80] *See id.* at 736

[81] *See id.* at 746

[82] *See id.* at 747

> swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.[83]

In short, the Canadian treatment of hate speech differs from its American counterpart in two principal respects. First, it is grounded in somewhat different normative priorities; second, the two countries differ in their practical assessments of the consequences of tolerating hate speech. Under the American view, there seems to be a greater likelihood of harm from suppression of hate speech that falls short of incitement to violence than from its toleration. From a Canadian perspective, on the other hand, dissemination of hate propaganda seems more dangerous than its suppression as it is seen as likely to produce enduring injuries to self-worth and to undermine social cohesion in the long run.[84]

B. *The United Kingdom*

Unlike the United States and Canada, the United Kingdom does not have a written constitution. Nevertheless, it recognizes a right to freedom of expression through its adherence to international covenants, such as the European Convention on Human Rights, and through commitment to constitutional values inherent in its rule of law tradition.[85] Moreover, the United Kingdom has criminalized hate speech going back as far as the seventeenth century. The focus of British regulation of free speech has shifted over the years, starting with concern for reinforcing the security of the government, continuing with preoccupation with incitement to racial hatred among nontarget audiences, and culminating with the aim of protecting targets against racially motivated harassment. As we shall see, the results of British regulation have been mixed, with significant success against Fascists and Nazis, but with much less success in attempts to defuse racial animosity between whites and nonwhites.

The seventeenth-century offense of seditious libel punished the utterance or publication of statements with "an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty . . . or to promote feelings of ill-will and hostility between different classes . . . [her] subjects."[86] To the extent that seditious libel allows for punishment of political criticism of the government,

[83] *Id.*

[84] The Canadian Supreme Court reaffirmed the approach to hate speech developed in *Keegstra* in Regina v. Krymowski, [2005] 1 S.C.R. 101.

[85] *See* European Convention on Human Rights and Fundamental Freedoms [ECHR], Nov. 4, 1950, art. 10, 213 U.N.T.S. 221, Regina v. Sec'y of State for the Home Dep't, *ex parte* Brind, 1 A.C. 696 (1991) (holding that freedom of expression is considered a basic right under both written and unwritten constitutions). Furthermore, through adoption of the Human Rights Act of 1998, which became effective in October 2000, the United Kingdom has incorporated ECHR Article 10 into domestic law, thus making it directly applicable before British courts. *See* Thomas Morton, "Free Speech v. Racial Aggravation," 149 *New L.J.* 1198 (1999).

[86] Anthony Lester and Geoffrey Bindman, *Race and Law in Great Britain* 345 (Harvard University Press 1972).

it contravenes a core function of modern freedom-of-expression rights. Although seditious libel was primarily used to punish those perceived to pose a threat to the monarchy, occasionally, it was used in the context of what today is called "hate speech."[87] Thus, in *Regina v. Osborne*,[88] the publishers of a pamphlet that asserted that certain Jews had killed a woman and her child because the latter's father was a Christian were convicted of seditious libel. As a consequence of distribution of the pamphlet, some Jews were beaten and threatened with death.[89] As this case involved direct incitement to violence and a clear threat to the maintenance of public order, it may be best viewed as vindicating government dominance and control rather than as protecting the Jews from group defamation.

Because seditious libel can be used to frustrate criticism of government, it can pose a threat to the kind of vigorous debate that is indispensable in a working democracy. In the early twentieth century, seditious libel became rather ineffective as convictions could only be obtained upon proof of direct incitement to violence or breach of public order.[90] In 1936, Parliament adopted *The Public Order Act*.[91] This legislation, which proved useful in combating the rise of British fascism prior to and during World War II, relaxed the seditious libel standards in two critical respects: first, it allowed for punishment of speech "likely" to lead to violence even if it did not actually result in violence; second, it allowed for punishment of mere intent to provoke violence.[92]

After World War II, the United Kingdom enacted further laws against hate propaganda, consistent with its obligations under international covenants.[93] Thus, in 1965, the British Parliament enacted Section 6 of the Race Relations Act (RRA 1965), which made it a crime to utter in public or to publish words "which are threatening, abusive or insulting," and which are intended to incite hatred on the basis of race, color, or national origin.[94]

The RRA 1965 focuses on incitement to hatred rather than on incitement to violence, but it reintroduces proof of intent as a prerequisite to conviction. This makes prosecution more difficult, as evinced by the acquittal in the 1968 *Southern News* case.[95] The case involved a publication of the Racial Preservation Society, which advocated the "return of people of other races from this overcrowded island to their own countries." At trial, the publishers asserted that their paper addressed important

[87] *Id.*

[88] 2 Swanst. 503n (1732).

[89] *See* Lester and Bindman, *supra* note 86, at 345.

[90] *Id.* at 347.

[91] Public Order Act, 1936, 1 Geo. 6, c. 6 (Eng.).

[92] *See* Nathan Courtney, "British and U.S. Hate Speech Legislation: A Comparison," 19 *Brook. J. Int'l L.* 727, 731 (1993).

[93] *Id.* at 733.

[94] Race Relations Act, 1965, c. 73, § 6 (1) (Eng.).

[95] This is an unreported case discussed in the London *Times*. *See* "Race Act Not a Curb," *The Times* (London), Mar. 28, 1968, at 2.

social issues and that it did not attempt to incite hatred. Because of the prosecution's failure to establish the requisite intent, the net result of *Southern News* was the dissemination of its racist views in the mainstream press, and a judicial determination that its message was a legally protected expression of a political position rather than illegal promotion of hate speech.

The problem posed by *Southern News* was remedied by removal of the intent requirement in the Race Relations Act of 1976 (RRA 1976).[96] Moreover, the RRA 1965 did lead to convictions, but a number of these were obtained against leaders of the Black Liberation Movement in the late 1960s, raising disturbing questions, if not about the law itself, at least about its enforcement. For example, in *Regina v. Malik*,[97] the black defendant was convicted and sentenced to a year in prison for having asserted that whites are "vicious and nasty people" and for stating, *inter alia*,

> I saw in this country in 1952 white savages kicking black women. If you ever see a white man lay hands on a black woman, kill him immediately. If you love our brothers and sisters you will be willing to die for them.[98]

The defendant admitted that his speech was offensive to whites but argued that he had a right to respond to the evils that whites had perpetrated against blacks.[99] In another case, four blacks were convicted of incitement to racial hatred for a speech made at Hyde Park's Speakers' Corner in which they called on black nurses to give the wrong injection to white people.[100] The court was unswayed by the defendants' claim that they were expressing their frustrations as blacks who had to endure white racism.[101]

The laws discussed thus far have focused on threats to the public and on promotion of hatred through persuasion of nontarget audiences. In 1986, however, Parliament added Section 5 of the Public Order Act, which made hate speech punishable if it amounted to harassment of a target group or individual, and in 1997, it enacted the Protection from Harassment Act.[102] These provide more tools in the British legal arsenal against hate speech, but have not thus far led to any clearer or more definitive indication of the ultimate boundaries of punishable hate speech in the

[96] *See* Race Relations Act, 1976, c. 74, § 70 (Eng.), *quoted in* D.J. Walker and Michael J. Redman, *Racial Discrimination. A Simple Guide to the Provisions of the Race Relations Act of 1976*, at 215–16 (Shaw 1977).

[97] [1968] 1 All E.R. 582, 582 (C.A. 1967).

[98] "Bitter Attack on Whites," *The Times* (London), July 25, 1967, at 1.

[99] Although the previously cited passage urges violence if certain conditions are met, it clearly falls short of an "incitement" to violence. Actually, to the extent that it advocates violence to combat violence, it arguably preaches self-defense rather than mere aggression.

[100] *See* "Sentences Today on Four Coloured Men," *The Times* (London), Nov. 29, 1967, at 3.

[101] *Id.*

[102] *See* Public Order Act, 1986, c. 64, §§ 5–6 (Eng.); Protection From Harassment Act, 1997, c. 40, § 7 (Eng.)

United Kingdom. Thus, for example, there have been many allegations that the 1997 Act has been used by corporations to stifle legitimate protest.[103]

In 2006, the United Kingdom amended its hate-speech law through adoption of the Racial and Religious Hatred Act.[104] This Act prohibits threats that incite to religious hatred, but explicitly exempts religious criticism even if it involves "antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents."[105] The issue of hate speech targeting religion – highlighted by the worldwide controversy over the publication of the "Danish Cartoons" in 2005, which portrayed the prophet Muhammad in satirical and derogatory fashion and caused outrage among Muslims throughout the world – poses particularly thorny problems, some of the most salient of which will be briefly addressed later in the chapter.[106] Finally, in 2008, the United Kingdom added the incitement to hatred based on sexual orientation to the list of prohibited forms of expression.[107]

In the last analysis, the difficulties relating to hate speech regulation in the United Kingdom have to do less with the particular legal regime involved and more with the social and political context in which that regime is embedded. As already mentioned, British legislation has been much more successful in combating fascism and Nazism than in dealing with hatred between whites and nonwhites. Perhaps the reason for that difference is that a much greater consensus has prevailed in Britain concerning fascism than concerning the absorption and accommodation of the large, relatively recent influx of racial minorities.

C. *Germany*

The contemporary German approach to hate speech is the product of two principal influences: the German Constitution's conception of freedom of expression as properly circumscribed by fundamental values such as human dignity and by constitutional interests such as honor and personality;[108] and the Third Reich's historical record against the Jews, especially its virulent hate propaganda and discrimination that culminated in the Holocaust.

Unlike the United States, and much like Canada, Germany treats freedom of expression as one constitutional right among many, rather than as paramount or even as first among equals. Whereas under the Canadian constitution, freedom of expression is limited by constitutionally mandated vindications of equality and

[103] *See* Edward Countryman, "Those behind the harassment law did not want it to stifle protest," *guardian.co.uk*, Jan. 7, 2009, *available at* http://www.guardian.co.uk/commentisfree/2009/jan/07/harrassment-law

[104] Racial and Religious Hatred Act, 2006, c. 1 (U.K.).

[105] *Id.* at § 29J

[106] *See infra* Section V

[107] *See* Criminal Justice & Immigration Act, 2008, c. 4, sched. 16 (U.K.)

[108] *See supra* notes 72, 73

multiculturalism, under the German Basic Law, freedom of expression must be balanced against the pursuit of dignity and group-regarding concerns.[109]

The contrast between the German approach and other approaches to freedom of speech, such as the American or the Canadian, is well captured in the following summary assessment of the German Constitutional Court's treatment of free speech claims.

> First, the value of personal honor always trumps the right to utter untrue statements of fact made with knowledge of their falsity. If, on the other hand, untrue statements are made about a person after an effort was made to check for accuracy, the court will balance the conflicting rights and decide accordingly. Second, if true statements of fact invade the intimate personal sphere of an individual, the right to personal honor trumps freedom of speech But if such truths implicate the social sphere, the court once again resorts to balancing. Finally, if the expression of an opinion – as opposed to fact – constitutes a serious affront to the dignity of a person, the value of personal honor triumphs over speech. But if the damage to reputation is slight, then again the outcome of the case will depend on careful judicial balancing.[110]

In broad terms, freedom of speech, like other constitutional rights in Germany, is in part a negative right that is, a right against government – and, in part a positive right – that is, a right to government sponsorship and encouragement of free speech.[111] In contrast to the Anglo-American approach, which in its Lockean tradition regards fundamental rights as inalienable and as preceding and transcending civil society, the German tradition regards fundamental rights as depending on the (constitutional) state for their establishment and support. Consistent with this, the more free-speech rights are conceived and treated as positive rights, the easier it becomes to pin on the state the responsibility for hate speech that it may find repugnant, but that it does not prohibit or punish Furthermore, the German constitutional system is immersed in a normative framework that is more Kantian than Lockean, thus requiring a balancing of rights and duties not only on the side of the state, but also on that of the citizenry.[112]

As in the United States, in Germany freedom of speech is legitimated from the respective standpoints of the justification from democracy, from the pursuit of truth, and from autonomy. These justifications are conceived quite differently in Germany than in the United States, however, with the consequence that the nature and scope of free-speech rights in Germany stand in sharp contrast to their

[109] The values underlying the Basic Law's approach of freedom of expression were discussed by the German Constitutional Court in the landmark *Lüth* case, BverfGE 7, 198 (1958) (stating that the Basic Law 'establishes an objective order of values . . which centers upon dignity of the human personality developing freely within the social community") (translated in Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 363 [Duke University Press, 2d. ed 1997]).

[110] Kommers, *supra* note 109, at 424.

[111] *Id* at 386.

[112] *See id.* at 298, 305.

American counterparts. Indeed, because of its constitutional commitment to "militant democracy,"[113] the German justification from democracy does not encompass extremist antidemocratic speech, including hate speech advocating denial of democratic or constitutional rights to its targets. The German justification from the pursuit of truth, on the other hand, does not embrace its American counterpart's Millian presuppositions. This emerges clearly from the German Constitutional Court's firm conviction that established falsehoods can be safely denied protection without hindrance to the pursuit of truth.[114] Finally, the German justification from autonomy is not centered on the autonomy of the speakers, as its American counterpart has proven to date. Instead, the German justification implies the need to strike a balance between rights and duties, between the individual and the community, and between the self-expression needs of speakers and the self-respect and dignity of listeners.

The contemporary German constitutional system is grounded in an order of objective values, including respect for human dignity and perpetual commitment to militant democracy.[115] As such, it excludes certain creeds and thus paves the way for content-based restrictions on freedom of speech that would be unacceptable under American free-speech jurisprudence.[116] Undoubtedly, the German Basic Law's adoption of certain values and the consequent legitimacy of content-based speech regulation originated in the deliberate commitment to repudiate the country's Nazi past and to prevent at all costs any possible resurgence of it in the future. Within this context, concern with protection of the Jewish community and with prevention of any rekindling of virulent anti-Semitism within the general population has left a definite imprint not only on the constitutional treatment of hate speech, but also on the evolution of free-speech doctrine more generally.

Evidence of this can be found in the Constitutional Court's landmark decision in the 1958 *Lüth Case*.[117] *Lüth* involved an appeal to boycott a postwar movie by a director who had been popular during the Nazi period as the producer of a notoriously anti-Semitic film. Lüth, who had advocated the boycott and who was an active member of a group seeking to heal the wounds between Christians and Jews, was enjoined by a Hamburg court from continuing his advocacy of a boycott. He

[113] See Grundgesetz [GG] art. 21 (F.R.G.), *translated in The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law With a Translation of the Basic Law* 236 (Ulrich Karpen ed., Nomos 1988).

[114] *See, e.g.*, Holocaust Denial Case, 90 BVerfGE 241 (1994)

[115] Neither Article 1 of the Basic Law, which enshrines human dignity, nor Article 21, which establishes militant democracy, are subject to amendment and are thus made permanent fixtures of the German constitutional order.

[116] *See, e.g.*, R A V v City of St Paul, 505 U.S 377 (1992) (holding hate speech prohibition unconstitutional on ground that it promoted viewpoint discrimination by targeting racial hatred, but not hatred against homosexuals). See *supra* Section II and accompanying notes for a discussion of the *R.A.V* case.

[117] BverfGE 7, 198 (1958).

filed a complaint with the Constitutional Court claiming a denial of his free-speech rights.

The Constitutional Court upheld Lüth's claim and voided the injunction against him, noting that he was motivated by apprehension that the reemergence of a film director who had been identified with Nazi anti-Semitic propaganda might be interpreted, especially abroad, "to mean that nothing had changed in German cultural life since the National Socialist period. . . ."[118] The Court went on to note that Lüth's concerns were very important for Germans as "[n]othing has damaged the German reputation as much as the cruel Nazi persecution of the Jews. A crucial interest exists, therefore, in assuring the world that the German people have abandoned this attitude. . . ."[119] Accordingly, in balancing Lüth's free-speech interests against the film director's professional and economic interests, the Court concluded that "[w]here the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual economic interests must, in principle, yield."[120]

Germany has sought to curb hate speech with a broad array of legal tools. These include criminal and civil laws that protect against insult, defamation, and other forms of verbal assault, such as attacks against a person's honor or integrity, damage to reputation, and disparaging the memory of the dead.[121] Although the precise legal standards applicable to the regulation of hate speech have evolved over the years,[122] hate speech against groups, and anti-Semitic propaganda in particular, have been routinely curbed by the German courts. For example, spreading pamphlets charging "the Jews" with numerous crimes and conspiracies, and even putting a sticker only saying "Jew" on the election posters of a candidate running for office, were deemed properly punishable by the courts.[123]

Under current law, criminal liability can be imposed for incitement to hatred or for attacks on human dignity against individuals or groups determined by nationality, race, religion, or ethnic origin.[124] Some of these provisions require showing a threat to public peace, whereas others do not.[125] But even when such a showing is necessary, it imposes a standard that is easily met,[126] in sharp contrast to the American requirement of proof of an incitement to violence.

Perhaps the most notorious and controversial offshoot of Germany's attempts to combat hate speech relate to the prohibitions against denying the Holocaust, or to use a literal translation of the German expression – to engage in the "Auschwitz lie."[127] Attempts to combat Holocaust denials raise difficult questions not only concerning the proper boundaries between fact and opinion, but also concerning the limits of academic freedom.

[118] Kommers, *supra* note 109, at 367.
[119] *Id.*
[120] *Id.*
[121] *See* Kübler, *supra* note 7, at 340.
[122] For an account of the most important changes, *see id.* at 340–7.
[123] *See id.* at 343–4.
[124] *See id.* at 344.
[125] *Id.* at 345.
[126] *See id.* at 344, n. 32.

These issues came before the Constitutional Court in the *Holocaust Denial Case* in 1994.[128] This case arose as a consequence of an invitation to speak at a public meeting issued by a far-right political party to David Irving, a revisionist British historian who has argued that the mass extermination of Jews during the Third Reich never took place. The government conditioned permission for the meeting on assurance that Holocaust denial would not occur, stating that such denial would amount to "denigration of the memory of the dead, criminal agitation, and, most important, criminal insult, all of which are prohibited by the Criminal Code."[129] Thereupon, the far right party brought a complaint alleging an infringement of its freedom-of-expression rights.

Relying on the distinction between fact and opinion and emphasizing that demonstrably false facts have no genuine role in opinion formation, the Constitutional Court upheld the lower court's rejection of the complaint. In so doing, the Court cited the following passage from the lower court's opinion:

> The historical fact itself, that human beings were singled out according to the criteria of the so-called "Nuremberg Laws" and robbed of their individuality for the purpose of extermination, puts Jews living in the Federal Republic in a special, personal relationship vis-à-vis their fellow citizens; what happened [then] is also present in this relationship today. It is part of their personal self-perception to be understood as part of a group of people who stand out by virtue of their fate and in relation to whom there is a special moral responsibility on the part of all others, and that this is part of their dignity. Respect for this self-perception, for each individual, is one of the guarantees against repetition of this kind of discrimination and forms a basic condition of their lives in the Federal Republic. Whoever seeks to deny these events denies vis-à-vis each individual the personal worth of [Jewish persons]. For the person concerned, this is continuing discrimination against the group to which he belongs and, as part of the group, against him.[130]

In short, given the special circumstances involved, Holocaust denial is seen as robbing the Jews in Germany of their individual and collective identity and dignity, and as threatening to undermine the rest of the population's duty to maintain a social and political environment in which Jews and the Jewish community can feel themselves to be an integral part.

Holocaust denial in relation to the Jews in Germany presents a very special case. But what about the fact/opinion distinction in other contexts? Or hate speech and insults against other individuals or groups?

[127] *Id.* at 344–6.
[128] 90 BVerfGE 241 (1994).
[129] Kommers, *supra* note 109, at 383.
[130] *Id.* at 386.

The Constitutional Court rendered a controversial decision bearing on the fact/opinion distinction in the *Historical Fabrication Case*.[131] That case involved a book claiming that Germany was not to be blamed for the outbreak of World War II, as that war was thrust on it by its enemies. The Court held that the book's claim amounted to an "opinion" – albeit a clearly unwarranted one – and was thus within the realm of protected speech.[132] Who is to blame for the outbreak of the war is clearly more a matter of opinion than whether or not the Holocaust took place, but the line between fact and opinion is by no means as neat as the Constitutional Court's jurisprudence suggests. For example, is admission of the Holocaust coupled with the claim that the Jews brought it on themselves a protected opinion or such a gross distortion of the facts as to warrant equating the "opinion" involved with assertion of patently false facts?

Insults linked to false statements targeting groups other than Jews was at the core of the Constitutional Court's decision in the *Tucholsky I Case*,[133] which dealt with the display of a bumper sticker on a car with the slogan "soldiers are murderers." The bumper sticker in question had been displayed by a social science teacher who was a pacifist and who objected to Germany's military role in the 1991 Gulf War. Moreover, this slogan had a long pedigree in German history as it was the creation of the writer Kurt Tucholsky, an anti-Nazi pacifist of the 1930s who was stripped of his German citizenship in 1933.

The lower court interpreting the slogan literally found it to be a defamatory incitement to hatred, which assaulted the human dignity of all soldiers. By asserting that all soldiers are murderers, the slogan cast them as unworthy members of the community. Based on this analysis, the social science teacher was fined for violating the criminal code's prohibition against incitement to hatred against an identifiable group within society.

The Constitutional Court, construing the slogan as an expression of opinion, held it to be constitutionally protected speech. In so doing, the Court asserted that the slogan should not be construed literally. Emphasizing that the slogan had been displayed next to a photograph from the Spanish Civil War showing a dying soldier who had been hit by a bullet accompanied by an inscription of the word "why?", the Court interpreted the message of the slogan as casting soldiers as much as victims as it had as killers. Accordingly, the slogan could be interpreted as an appeal to reject militarism, by asking why society forces soldiers – who are members of society as everyone else – to become potential murderers and to expose them to becoming victims of murder.

The Constitutional Court's decision provoked an angry reaction among politicians, journalists, and scholars.[134] The Court revisited the issue as it reviewed other

[131] 90 BVerfGE 1 (1994).
[132] *See* Kommers, *supra* note 109, at 387.
[133] 21 EuGRZ 463–65 (1994).
[134] *See* Kommers, *supra* note 109, at 392–3.

criminal convictions in cases involving statements claiming that "soldiers are murderers" or "soldiers are potential murderers," in its 1995 *Tucholsky II Case*.[135] Noting that the attacks involved were not against any particular soldier but against soldiers as agents of the government, the Court reiterated that the statements involved amounted to constitutionally protected expressions of opinion rather than to the spreading of false facts. The Court recognized that public institutions deserve protection from attacks that may undermine their social acceptance. Nonetheless, the Court concluded that the right to express political opinions critical or even insulting to political institutions, rather than to any segment of the population, outweighed the affected institutions' need for protection.

These two decisions illustrate some of the difficulties involved in drawing cogent lines between fact and opinion, and between acceptable – and in a democracy indispensable – political criticism and inflammatory excesses threatening the continued viability of public institutions. This notwithstanding, in Germany, the prohibitions against hate speech are firmly grounded. The only open questions concern their constitutional boundaries in cases that do not involve anti-Semitism or the Holocaust.

D. *Hungary*

Hungary's hate-speech jurisprudence in the aftermath of its transition from socialism to constitutional democracy rests on a paradox or, more precisely, as will be briefly described later in the chapter, on a series of paradoxes. As already noted, from a historical standpoint, Hungary's experience relevant to hate speech is very much like that of Germany, its ally during World War II. Hungary took an active part in the Holocaust and most of its Jews outside of Budapest were exterminated in 1944.[136] Furthermore, Hungary currently has the largest Jewish population in Central Europe and a recent history of virulent anti-Semitic and anti-Roma rhetoric and intimidation.[137]

On the other hand, unlike West Germany, which became a thriving constitutional democracy only a few years after the end of World War II, Hungary went almost straight from Nazi to Soviet domination. Because of this, Hungary lacked any genuine opportunity to fully air its life under authoritarian rule before the end of

[135] *Id.* at 393.
[136] *See* Peter Molnar, "Towards Improved Law and Policy on 'Hate Speech' – The 'Clear and Present Danger' Test in Hungary," in *Extreme Speech & Democracy* 237, 244 (Ivan Hare & James Weinstein eds., Oxford University Press 2009).
[137] In the April 2010 Parliamentary elections, Jobbik, a neo Nazi party with an open and virulent anti-Semitic and anti Roma political agenda, obtained around 17% of the vote and, for the first time, seats in the Parliament. *See* Bruno Waterfield, 'Hungary Elections – First Step to Power for Far Right since Nazi Era," *Telegraph.co.uk*, Apr. 11, 2010, *available at* http://www.telegraph.co.uk/news/worldnews/europe/hungary/7578561/Hungary-elections-first-step-to-power-for-far-Right-since-Nazi-era.html

the Soviet era [138] Under these circumstances, it is understandable that after emerging from Soviet domination, Hungary should embrace a very broad conception of freedom of speech closer to that of the United States than to that of Germany.[139]

Specifically, the Hungarian Constitutional Court (HCC) has adopted a hate-speech jurisprudence that tracks that of the United States in substance, albeit not in form. From the beginning, the HCC found criminalization of incitement to hatred on the basis of national, ethnic, or religious identity to be constitutional while proclaiming that group defamation on the same grounds was constitutionally protected.[140] Notwithstanding its drawing a formal line at "incitement to hatred," the HCC in effect imposed an "incitement to violence" standard by requiring that actual incitement to hatred produce a "clear and present danger" of violence to become constitutionally subject to criminal sanction.[141] Relying on this interpretation, moreover, lower courts concluded that thousands chanting at football matches that "the trains are ready for Auschwitz" was not criminally actionable.[142] As this upset many in a country that had had Nuremberg-like race laws and a World War II government with a hand in the deportation of Jews to extermination camps, the government tried to tighten hate speech laws in the late 1990s and early 2000s. In 1999 and 2004, the HCC struck down these laws as unconstitutional for failure to impose a "clear and present danger" standard.[143]

Whereas one can understand the HCC turning to the United States rather than Germany in spite of Hungary's World War II experience, there is a further paradox that defies any straightforward explanation. The HCC and Hungarian free-speech jurisprudence have retreated somewhat from their initial distinctly liberal bent.[144] This can be easily explained by the inevitable disappointments of the postcommunist era and to increased nationalism after the lifting of Soviet antinationalist repression. What is harder to explain, however, is a tension within the HCC's decisions. In two cases decided on the same day in 2000, the HCC upheld (a) the criminalization of disparagement of national symbols and (b) a prohibition on totalitarian symbols.[145] With the exception of the latter decision, however, the Court's ultra-liberal protection of hate speech has continued unabated,[146] as evidenced by the 1999 and 2004 decisions mentioned earlier. It is quite significant in this regard that

[138] *See* Molnar, *supra* note 136, at 244

[139] *See* Michel Rosenfeld and András Sajó, "Spreading Liberal Constitutionalism. An Inquiry into the Fate of Free Speech Rights in New Democracies," in *The Migration of Constitutional Ideas* 142, 162–3 (Sujit Choudhry ed., Cambridge University Press 2006).

[140] *Id.* at 161

[141] *Id.* at 163.

[142] *Id.*

[143] HCC, Decision 18/2004 (V.25) AB hat, HCC, Decision 12/1999 (V.21.) AB hat.

[144] *See* Rosenfeld and Sajó, *supra* note 139, at 168–9

[145] HCC, Decision 13/2000 (V. 12.) AB hat; HCC, Decision 14/2000 (V. 12.) AB hat. *See* Rosenfeld and Sajó, *supra* note 139, at 167.

[146] *See* Molnar, *supra* note 136, at 261-3. It is noteworthy that, in 2010, the Hungarian parliament criminalized holocaust denial. The HCC has not passed on the constitutionality of that law, however

the HCC aligned itself explicitly with the widespread European prohibition against disparagement of national symbols.[147] In view of this, the HCC seems split in its free-speech jurisprudence: European in the context of attacks on symbols held dear by the country's majority; American in the context of expressions of hate against two minorities historically subject to discrimination, violence, and abuse. Is the former a concession to strong majoritarian impulses? Or is the latter a valiant – albeit perhaps misguided – attempt to preserve as much free-speech liberalism as possible in an increasingly conservative era?

IV. THE TREATMENT OF HATE SPEECH UNDER INTERNATIONAL HUMAN RIGHTS NORMS

Freedom of speech is protected as a fundamental right under all the major international covenants on human rights adopted since the end of World War II, such as the 1948 UN Universal Declaration of Human Rights,[148] the 1966 UN Covenant on Civil and Political Rights (CCPR),[149] and the 1950 European Convention on Human Rights (ECHR).[150] These covenants, however, do not extend protection to all speech, and some, such as the CCPR, specifically condemn hate speech.[151] A particularly strong stand against hate speech, which includes a command to states to criminalize it, is promoted by Article 4 of the 1965 International Convention on the Elimination of All forms of Racial Discrimination (CERD). Article 4 provides, in relevant part, that States Parties,

> condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form . . . [;]
>
> [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination . . . and also the provision of any assistance to racist activities, including the financing thereof; [and]
>
> [s]hall declare illegal and prohibit organizations . . . and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law . . .[152]

[147] Rosenfeld and Sajó, *supra* note 139, at 167.

[148] *See Basic Documents on Human Rights* 25 (Ian Brownlie, Q.C. ed., Oxford University Press, 3rd ed. 1992)

[149] International Covenant on Civil and Political Rights art. 19, Mar. 23, 1976, 999 U.N.T.S. 171.

[150] European Convention on Human Rights and Fundamental Freedoms [ECHR], Nov. 4, 1950, art. 10 ¶2, 213 U.N.T.S. 221.

[151] *See* International Covenant on Civil and Political Rights, *supra* note 149, at art. 20 ¶2.

[152] International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, G.A. Res. 2106 A (XX), 660 U.N.T.S. 195 (1969).

The United States attached a reservation to its ratification of CERD, given that compliance with Article 4 would obviously contravene current American free-speech jurisprudence.[153]

International bodies charged with judicial review of hate-speech cases have, by and large, embraced positions that come much closer to those prevalent in Germany than to their U.S. counterpart. For example, in *Faurisson v. France*,[154] the UN Human Rights Committee upheld the conviction of Faurisson under France's "Gayssot Act," which makes it an offense to contest the existence of proven crimes against humanity. Faurisson, a French university professor, had promoted the view that the gas chambers at Auschwitz and other Nazi camps had not been used for the purposes of extermination, and claimed that all the people in France knew that "the myth of the gas chambers is a dishonest fabrication."

The Human Rights Committee decided that Faurisson's conviction for having violated the rights and reputation of others was consistent with the free-speech protection afforded by Article 19 of CCPR. Because Faurisson's statements were prone to foster anti-Semitism, their restriction served the legitimate purpose of furthering the Jewish community's right "to live free from fear of an atmosphere of anti-[S]emitism."

Notwithstanding its support for Faurisson's conviction, the Human Rights Committee noted that the Gayssot Act was overly broad inasmuch as it prohibited publication of bona fide historical research that would tend to contradict some of the conclusions arrived at the Nuremberg trials. Thus, whereas suppression of demonstrably false facts likely to kindle hatred is consistent with UN standards, suppression of plausible factual claims or of opinions based on such facts would not be justified even if it happened to lead to increased anti-Semitism.

The European Court of Human Rights has also upheld convictions for hate speech as consistent with the free-speech guarantees provided by Article 10 of the ECHR. An interesting case in point is *Jersild v. Denmark*.[155] The Danish courts had upheld the convictions of members of a racist youth group who had made derogatory and degrading remarks against immigrants, calling them, among other things, "niggers" and "animals," and that of a television journalist who had interviewed the youths in question and broadcast their views in the course of a television documentary that he had edited. The journalist appealed his conviction to the European Court, which unanimously stated that the convictions of the youths had been consistent with ECHR standards, but which, by a twelve-to-seven vote, held that the journalist's conviction violated the standards in question.

[153] *See* Kubler, *supra* note 7, at 357.

[154] U.N. GAOR, Hum. Rts. Comm., 58th Sess., Annex, U.N. Doc. CCPR/C/58/D/550/1993 (1996). The decision and related French prosecutions are discussed in Julie C. Suk, "Denying Experience: Holocaust Denial and the Free-Speech Theory of the State," Chapter 8 herein.

[155] App. No. 15890/89, 19 Eur. Ct. H.R. Rep. 1 (1995) (Commission report). *Jersild* and related decisions of the European Court of Human Rights are thoroughly canvassed in Tarlach McGonagle, "A Survey and Critical Analysis of Council of Europe Strategies for Countering 'Hate Speech'," Chapter 24 herein.

The convictions of the youths for having treated a segment of the population as being less than human were consistent with the limitations on free speech for "the protection of the reputation or rights of others" imposed by Article 10 of the ECHR.[156] The conviction of the journalist for aiding and abetting the youths had been premised on the finding that the broadcast had given wide publicity to views that would otherwise have reached but a very small audience, thus exacerbating the harm against the targets of the hate message. The European Court's majority stressed that the journalist had not endorsed the message of his racist interviewees and had tried to expose them and their message in terms of their social milieu, their frustrations, their propensity to violence, and their criminal records as posing important questions of public concern. The Court concluded that the journalist's conviction had been disproportionate in relation to the permissible aim of protecting the rights and reputations of the target group, because the journalist had no intent of promoting hatred; the legitimacy of his conviction turned on a balancing of his expression rights in reporting facts and conveying opinions about them and the harms imposed by the hate message on its targets. Both the majority and the dissenters on the European Court agreed that balancing was the proper approach. They disagreed, however, on how much weight should be borne by the competing interests involved. From the standpoint of the dissenters, the majority placed too much weight on the journalist's expression rights and too little on the protection of the dignity of the victims of hatred. The dissenters emphasized the fact that the journalist had edited down the interviews to the point of principally highlighting the racial slurs, and that he had at no point in the documentary expressed disapproval or condemnation of the statements uttered by his interviewees.

In the end, the disagreements between the majority and the dissent in *Jersild* center on the proper interpretation to be given to the general tenor of the documentary and to the attitude displayed in it by the journalist through his interviews and reports. Accordingly, just as it became plain in the context of hate-speech regulation in Germany, prohibitions against crude insults and patently false statements of fact generally seem legally manageable. On the other hand, issues depending on opinions or on drawing the often elusive line between fact and opinion present much more troubling questions.

A recent opinion by the UN Committee on the Elimination of Racial Discrimination in interpreting the scope of CERD explores the deeply problematic relationship between race-based and religion-based hate speech. In a 2007 decision in the case of *A.W.R.A.P. v. Denmark*,[157] the committee confronted the question of whether

[156] *See* European Convention on Human Rights and Fundamental Freedoms [ECHR], Nov. 4, 1950, art. 10(2), 213 U.N.T.S. 221.

[157] Communication No. 37/2006, U.N. Doc. CERD/C/71/D/37/2006 (Aug. 8, 2007).

anti-Islamic statements made by a member of the Danish parliament amounted to prohibited racial discrimination under CERD. The statements at stake, made in Parliament and in interviews with the press, included the declaration that "according to Islam it is the right of the male to beat his children and wife yellow and blue. That form of violence . . . is of sadistic and brutal character."[158] The complainant, a Danish Muslim citizen, had requested that his country's authorities take action against the parliamentarian who had expressed the aforementioned views, and upon the Danish authorities' refusal to take action, he petitioned the CERD Committee. The latter refused to intervene, however, concluding that the statements complained of did not fall within the scope of CERD. In the Committee's view, these statements concern "perception of persons of a specific religion and of a religious doctrine but do not concern persons of a particular 'race, colour, descent, or national or ethnic origin'. . [as] not all Muslims are of a particular ethnic origin . . . [or] of the same race."[159]

Whereas the Committee's conclusion is certainly literally accurate, it is nonetheless troubling. To a large extent, in many countries of immigration, religious minorities made up for the most part of immigrants, as is the case with Muslims in many European democracies, tend to be of different ethnic and national origin than the majority within their country of immigration More generally, the equation of race-based and religion-based hate speech is highly questionable as there may be more disanalogies than analogies between them, as will be now summarily explored.

V. THE SPECIAL PROBLEM OF RELIGION BASED HATE SPEECH WITH EMPHASIS ON THE DANISH CARTOONS CONTROVERSY

In a nutshell, the special problem posed by religion-based hate speech stems principally from two separate but often in practice intertwined factors: first, as alluded earlier, sometimes religion is tied to ethnic and national origin, and sometimes it is not; second, disparaging *religion* cannot in many cases be equated with disparaging *the religious*.

Some religions, such as Judaism, are tied to a particular people, whereas others, such as Buddhism, Christianity, or Islam, are not Significantly, anti-Semitism has been historically both religion and race-based. Whereas the Jew could for the most part overcome religion-based anti-Semitism by converting to the majority religion – for example, Christianity – religious conversion proved of no use to avoid extermination under Nazi race-based anti-Semitism, as it sufficed for that purpose to have one Jewish grandparent. Notwithstanding this difference, and as evinced by the previously described early seditious libel case that arose in the United Kingdom,[160] hate

[158] *Id* at 2 3
[159] *Id* at 4 1
[160] *See supra* notes 88 and 89 and accompanying text

against the Jewish religion and hate against Jews often loom as fungible from the standpoint of hate speech. Indeed, there seems to be little difference between falsely claiming that the Jewish religion requires murdering Christian children for use of their blood in Passover rituals and defaming Jews by accusing them of stopping at nothing, including theft and murder, to further their quest for world domination.

Even in relation to religions that are universal in scope, there are circumstances in which hate directed at the religion largely overlaps with hate targeting adherents of the religion. Thus, in the context of a predominantly Christian European country with an Arab minority that is overwhelmingly Muslim, anti-Arab and anti-Muslim hate speech may largely overlap. Moreover, in cases where hate speech targeting a religion stands primarily as a proxy for hate speech targeting those who practice that religion on account of the latter's racial, ethnic, or national origin, it seems reasonable to treat religion-based hate speech much like its race-based counterpart.

In stark contrast, criticism of a particular religion itself, even if disparaging and highly offensive to those deeply committed to it, is an altogether different matter. Freedom to criticize religion is historically embedded at the very core of freedom of expression as it emerged during the period of the Enlightenment as encapsulated in Voltaire's famous battle cry "Écrasez L'Infâme" ("Crush the Infamous One") directed against the Catholic Church [161] Indeed, freedom of expression was then perceived as crucial in the struggle against the authoritarian rule of the absolute monarch and against the stranglehold of the Church on public discourse and acceptable morals Moreover, freedom to criticize religion – which should be broadly construed as also encompassing the freedom to criticize the rejection of religion – still remains central to contemporary freedom of speech. Religion is liberating to some, oppressive to others; an indispensable source of morality for some, an invariable source of prejudice and violence for others; the necessary glue for a just political society according to some, the greatest impediment to freedom and equality for all regardless of sex, gender, or sexual orientation, according to others Also, because of these vivid splits, the discussion around religion often tends to be vigorous, pungent, and trenchant. It often turns to satire, caricature, ridicule, oversimplification, and distortion, and it is particularly prone to provoking feelings of anger, resentment, humiliation, and contempt.

Consistent with these observations, hatred toward religion (or nonreligion) or toward particular religions because of their dogmas or teachings would seem analogous to hatred toward particular ideologies or political agendas, and accordingly should be equally tolerated. Just as one should be free to expound virulently against communism, capitalism, colonialism, or excessive permissiveness, one should also be free to angrily denounce, caricature, or vilify a religion that one is convinced is

[161] *See Rousseau and L'Infâme· Religion, Toleration, and Fanaticism in the Age of Enlightenment* 9 (Ourida Mostefai & John T. Scott eds , Rodopi 2009)

homophobic or sexist, or atheism if one deems that godlessness leads to the moral disintegration of society.

When it comes to criticizing, negatively portraying, or satirizing religion, freedom of speech has been limited in many countries through application of blasphemy laws. Thus, for example, Austrian courts ordered seizure of a film deemed an abusive attack on the Catholic religion because of its provocative portrayal of God the Father, the Virgin Mary, and Jesus Christ. The seizure in question was challenged before the European Court of Human Rights. That court deferred to Austria, deeming that it had not acted disproportionately in its aim to ensure religious peace and to prevent believers from feeling the objects of attacks on account of their religious convictions in an unwarranted and offensive way.[162]

As Catholicism is the religion of a vast majority of Austrians, attacks on that religion through depictions such as those present in the film seized by Austrian authorities cannot be equated with race-based or national origin-based hatred. Although it is beyond the scope of this undertaking to examine the issue in any detail, "blasphemy" against a majority religion is best defined as any speech offensive to deeply held beliefs or ideological precepts prevalent through a polity. Blasphemy laws run deeply counter to liberal conceptions of free speech, but be that as it may, for present purposes, suffice it to stress that blasphemy standing alone need not be regarded as raising any significant hate-speech issue.

The matter may appear entirely different, however, when the religion attacked is a minority one practiced mainly by "outsiders" who are not smoothly integrated into the social fabric of the polity. This difference, however, is vividly illustrated by the Danish Cartoons controversy, where an attack on a religion was sought to be cast as conflating with a racist or ethnic-based attack on that religion's practitioners.

The controversy arose as a consequence of the publication in a Danish newspaper of a series of cartoons that were derogatory, satirical, and offensive from the standpoint of Islam. As one commentator observed:

> The cartoons themselves are rather uninteresting. Some simply depict a man wearing traditional Arab dress, while others present the Prophet [Muhammad] in a satirical context. For example, in one cartoon, the Prophet stands at the gates of heaven halting people from entering, saying "Stop, stop, we ran out of virgins." In another cartoon, perhaps the most provocative, a bearded Arab-looking man wears a bomb that looks like a turban, which has the Islamic declaration of faith written on it: "There is no god but Allah and Muhammad is the Messenger of God."[163]

Muslims worldwide saw the cartoons as an attack on their prophet, their religion, and their community, and Muslims' reaction to the cartoons ranged from a boycott

[162] *See* Otto-Preminger Institute v Austria, 295 Eur Ct. H. R. (Ser. A) (1994)

[163] Anver M. Emon, "On the Pope, Cartoons, and Apostates Shari'a 2006," 22 *J.L. & Religion* 303, 308 (2006–2007)

of Danish goods to violent riots resulting in damages to European embassies.[164] Under the Shari'a, a Muslim who insults the prophet is guilty of apostasy and may be condemned to death.[165]

From a liberal standpoint, the cartoons are clearly protected speech similar to the disparaging depiction of God the Father, the Virgin Mary, and Jesus Christ in the film at the center of the *Preminger* case discussed earlier. In both cases, the proponents of the offensive depictions presumably used these to expose what they perceive as the oppressive and sanctimonious positions spread by Catholicism and Islam, respectively. Consistent with this, caricaturing and satirizing religion and venerated religious figures like Jesus or Muhammad seem analogous to doing the same with respect to political ideologies and their charismatic champions. Although ridiculing religions and religious figures may be more offensive to more people, from a liberal free-speech perspective, it ought to be deemed no different than caricaturing and satirizing Franklin Roosevelt and the New Deal, De Gaulle and his political vision for France, Margaret Thatcher and Thatcherism, or Ronald Reagan and his brand of political conservatism. In all these cases, the critics wish to take the larger-than-life figures involved off their pedestals as a step toward desacralizing their projects. In this context, a caricature may prove much more effective than a carefully reasoned expose of the shortcomings of the positions that the relevant critic stands against.

To transform the Danish cartoons from mere blasphemy to "racist" hate speech, it was necessary to transform an attack on a religion and on its most highly revered religious figure into an assault against the religious community that embraced that religion – a religious community that happens to constitute, moreover, a minority in Europe. As one observer puts it:

> Criticism of religion can be labeled "racist" through the following argumentative process First, blasphemy is an attack on God, but it also aggresses believers... Second[] such an attack.. is racist in that, the argument goes, in order to attack a religious group in such a violent way, one necessarily must despise or hate "these people." The offender entertains a sort of irrational fear a "phobia." The term "Islamophobia" was coined in that context.[166]

In short, by claiming violations of their freedom of religion, equality, and dignity rights, Muslims seek to turn criticism of certain forms of violent politics claimed by their proponents to be based on Islamic fundamentalist prescriptions into race-based, religion-based, and ethnic-origin-based hate speech.

The liberal repudiation of speech restrictions based on blasphemy would be sufficient to justify full free speech protection to the Danish cartoons, but for two complicating factors First, Islam in Europe is a minority religion; second, there is a question of whether the cartoons are directed against the Islamic religion or against

[164] *Id.* at 309.

[165] *Id* at 312

[166] Guy Haarscher, "Religious Revival and Pseudo-Secularism," 30 *Cardozo L Rev* 2799, 2809 (2009)

Muslims as a "race" or ethno-cultural group as opposed to those who embrace a creed perceived by its critics as being both undesirable and dangerous.

Blasphemy, particularly as expressed in films or cartoons, does not restrict the freedom of religion of those offended by them. They do not affect the belief, worship, or practice of spreading the religion they attack, and the religious by and large can avoid exposure to the offensive films or caricatures. Accordingly, in the case of the majority religion in a polity, the free-speech protection of blasphemy far outweighs whatever harm blasphemy may cause to the rights of those who are offended by it. The same, however, does not necessarily follow in the case of a minority religion. Suppose the Danish cartoons conveyed nothing negative against Muslims as a minority group, but only that Islam is a cruel and violent religion. Would a Muslim in Denmark be similarly situated to a Frenchman or Italian in their respective countries in the context of cartoons depicting Catholicism as a venal, power-hungry, and cruel religion? Arguably, the answer is in the negative as anti-Islam attitudes can easily and imperceptibly slip into anti-Muslim sentiments in a way that anti-Catholicism is not at all likely to degenerate into anti French in France or anti-Italian in Italy. Therefore, it seems much more difficult to exclude slippage from antireligion speech to hate speech in the case of minority religions than in that of a majority religion.

Determining whether the message of the Danish cartoons is anti-Islam or anti-Muslim is even more difficult. One possible interpretation of the cartoons is that they ridicule jihadist Islamic fundamentalism such as that preached by Al Qaeda and all those who sympathize with it. Another plausible interpretation, however, is that all Arabs or all Muslims are violent and likely to become terrorists as even their prophet does not seem beyond planting bombs that would kill innocent bystanders in the pursuit of his community's hegemonic and domineering aims.

Denouncing all Muslims as would be terrorists and suicide bombers bent on killing infidels constitutes hate speech similar to accusing Jews of killing Christian babies for use in Passover rituals. The Danish cartoons do not go that far by any means, but nonetheless pose difficult line-drawing problems. To the extent that they are criticisms of a religion, they ought to be fully protected; on the other hand, if they amount to group defamation against a minority community, they come within the ambit of hate speech. Ideally, courts could sift our criticism of religion from defamation of a religious group. In practice, however, that will often prove impossible. That leaves essentially three alternatives: (1) a blanket protection of all expression like that found in the Danish cartoons, (2) a blanket prohibition of all such expressions; or (3) use of a proportionality standard that would accord a strong presumption of protection to any utterance that can be plausibly understood as registering a genuine criticism of religion (including one that is caricatural or satiric in form) that could only be overcome in cases of demonstrable great palpable harm amounting to defamation on the basis of race, ethnic or national origin, or religious affiliation (as contrasted to religion). Under this latter standard, blood libel against

Jews and blanket portrayal of all Muslims as terrorists would clearly be actionable hate speech in countries that use an incitement-to-hatred standard. In contrast, the Danish cartoons would be protected in light of the plausibility of one of the two interpretations mentioned previously, namely that the cartoons deride the jihadist interpretation of Islam that has been advanced by certain fundamentalists such as those associated with Al Qaeda.[167]

VI. CONFRONTING THE CHALLENGES OF HATE SPEECH IN CONTEMPORARY CONSTITUTIONAL DEMOCRACIES. OBSERVATIONS AND PROPOSALS

The preceding analysis reveals that both protection and prohibition of hate speech raise serious and difficult problems. Not all hate speech is alike, and its consequences may vary from one setting to another. Furthermore, to the extent that hate speech produces harms that are not immediate, these may be uncertain and hard to measure. The impact of hate speech also seems to depend to a significant extent on the medium of its communication. Thus, an oral communication to a relatively small audience at Speakers' Corner in London's Hyde Park should not be automatically lumped together with a posting on the Internet available worldwide.

The two contrasting approaches to hate speech adopted by the United States and by other western democracies each have advantages and drawbacks. The main advantage of the American approach is that it makes for relatively clear-cut boundaries between permissible and impermissible speech. And, at least in cases in which hate speech poses little threat to its targets and its message is repudiated by an overwhelming majority of its nontarget audience, as in the *Skokie* case, tolerance may be preferable. Indeed in that case, the dangers stemming from suppression and the possible spread underground of hate speech would seem to outweigh the harm from unconstrained communication. The same, however, may not be true for a country like Hungary where hate speech has much greater resonance for a significant portion of the nontarget audience.

The chief disadvantage of the American approach is that it is not attuned to potentially serious harms that may unfold gradually over time or have their greatest immediate impact in remote places. In addition, the American approach tends to remain blind to the considerable potential harm that hate speech can cause to the equality and dignity concerns of its victims or the attitudes and beliefs of nontarget audiences. The latter groups may reject the explicit appeal to hate but nonetheless

[167] Consistent with these observations, the various "defamation of religion" resolutions adopted by the United Nations, including the UN Human Rights Council Resolution 7/19 "Combating Defamation of Religions" ¶¶ 9,12, Rep. of the Human Rights Council A63/53, Mar. 27, 2008, would be objectionable inasmuch as they would inevitably unduly curtail legitimate freedom-of-speech rights.

be influenced by the more diffuse implicit message lurking beneath the surface of that appeal.[168]

The principal advantages to the approach to hate speech prevalent outside the United States are that it makes for unequivocal condemnation of it as morally repugnant, and at least in some cases, such as in the United Kingdom's efforts against the spread of fascist hate propaganda, it can play an important role in the struggle against extremist antidemocratic political movements. Furthermore, as exemplified by contemporary Germany's steadfast and continuous bans of anti-Semitic hate propaganda, vigorous prohibition and enforcement can bolster the security, dignity, autonomy, and well-being of the target community, while at the same time reminding nontarget groups and society at large that the hate message at stake is not only repugnant and unacceptable, but that it will not be tolerated, and that those who are bent on spreading it will be punished.

The principal disadvantages to the approach to hate speech under consideration, on the other hand, are. that it inevitably has to confront difficult line-drawing problems, such as that between fact and opinion in the context of the German scheme of regulation; that when prosecution of perpetrators of hate speech fails, such as in the British *Southern News* case,[169] regulation may unwittingly do more to legitimate and disseminate hate propaganda at issue than a complete absence of regulation would have;[170] that prosecutions may be too selective or too indiscriminate owing to (often unconscious) biases prevalent among law enforcement officials, as appears to have been the case in the prosecutions of certain black activists under the British Race Relations Act; and that because not all that may appear to be hate speech actually is hate speech – such as the documentary report involved in *Jersild v. Denmark* or a play in which a racist character engages in hate speech, but the dramatist intends to convey an antihate message - regulation of that speech may unwisely bestow powers of censorship over legitimate political, literary, and artistic expression on government officials and judges.

In the last analysis, none of the existing approaches to hate speech are ideal, but on balance, the American seems less satisfactory than its alternatives. Above all, the American approach seems significantly flawed in some of its assumptions, in its impact, and in the message it conveys concerning the evils surrounding hate speech In terms of assumptions, the American approach either underestimates the potential for harm of hate speech that is short of incitement to violence, or it overestimates the

[168] This may have occurred for many whites in connection with the *R A V.* case See *supra* Section II for a discussion of *R.A.V* These whites most likely found the cross burning repugnant, but nonetheless did not want to live in a racially mixed neighborhood. They may even have hidden that belief from themselves by rationalizing that it is better to have a racially segregated neighborhood to avoid the kind of ugly violence exemplified by cross burning

[169] *See supra* note 95.

[170] This disadvantage should not be overestimated, however. Indeed, if most prosecutions against a certain type of hate succeed and only a few fail, then conceivably prohibition may on the whole be preferable to freedom spread through lack of regulation.

potential of rational deliberation as a means to neutralize calls to hate. In terms of impact, given its long history of racial tensions, it is surprising that the United States does not exhibit greater concern for the injuries to security, dignity, autonomy, and well-being that officially tolerated hate speech causes to its black minority. Likewise, America's hate-speech approach seems to unduly discount the pernicious impact that racist hate speech may have on lingering or dormant racist sentiments still harbored by a non-negligible segment of the white population.[171] Furthermore, even if we discount the domestic impact of hate speech, given the worldwide spread of locally produced hate speech, such as in the case of American-manufactured neo-Nazi propaganda disseminated through the World Wide Web, a strong argument can be made that American courts should factor in the obvious and serious impact abroad of certain domestic hate speech in determining whether such speech should be entitled to constitutional protection. Finally, in terms of the message conveyed by refusing to curb most hate speech, the American approach is a double-edged sword. On the one hand, tolerance of hate speech in a country in which democracy has been solidly entrenched since independence more than two hundred years ago conveys a message of confidence against both the message and the prospects of those who endeavor to spread hate.[172] On the other hand, tolerance of hate speech in a country with serious and enduring race-relation problems may reinforce racism and hamper full integration of the victims of racism within the broader community.[173]

The argument in favor of opting for greater regulation of hate speech than that provided in the United States rests on several important considerations, some related to the place and function of free speech in contemporary constitutional democracies, and others to the dangers and problems surrounding hate speech. Contemporary constitutional democracies are increasingly diverse, multiracial, multicultural, multireligious, and multilingual. Because of this and because of increased migration, a commitment to pluralism and to respect of diversity seem inextricably linked to vindication of the most fundamental individual and collective rights. Increased diversity is prone to making social cohesion more precarious, thus, if anything, exacerbating the potential evils of hate speech. Contemporary democratic states, on the other hand, are less prone to curtailing free speech rights than their predecessors either because of deeper implantation of the democratic ethos or because respect of

[171] In this connection, it is significant that following a steep rise in racist incidents involving hate speech on university campuses throughout the United States, several universities, including the University of Michigan and Stanford University, adopted regulations against hate speech. These were, however, struck down as unconstitutional by lower courts because they restricted speech falling short of the incitement to violence standard. *See* Doe v. Univ of Mich., 721 F Supp. 852 (E D. Mich 1989), Corry v. Stanford, No. 74039 (Cal. Super. Ct Santa Clara Co. Feb 27, 1995) (applying constitutional standard incorporated in state law and made applicable to private universities)

[172] This is the view defended in Bollinger, *supra* note 18.

[173] For a discussion of the uses of tolerance of hate speech to promote existing racism, see Rosenfeld, *supra* note 55, at 1457, 1487

supranational norms has become inextricably linked to continued membership in supranational alliances that further vital national interests.

In these circumstances, contemporary democracies are more likely to find themselves in a situation like stage four in the context of the American experience with free speech rather than in one that more closely approximates a stage-one experience.[174] In other words, to drown out minority discourse seems a much greater threat than government-prompted censorship in contemporary constitutional democracies that are pluralistic. Actually, viewed more closely, contemporary pluralistic democracies tend to be in a situation that combines the main features of stage two and stage four. Thus, the main threats to full-fledged freedom of expression would seem to come primarily from the "tyranny of the majority" as reflected both within the government and without, and from the dominance of majority discourses at the expense of minority ones.

If it is true that majority conformity and the dominance of its discourse pose the greatest threat to uninhibited self-expression and unconstrained political debate in a contemporary pluralist polity, then significant regulation of hate speech seems justified This is not only because hate speech obviously inhibits the self-expression and opportunity of inclusion of its victims, but also, less obviously, because hate speech tends to bear closer links to majority views than might initially appear. Indeed, in a multicultural society, although crude insults uttered by a member of the majority directed against a minority may be unequivocally rejected by almost all other members of the majority culture, the concerns that led to the hate message may be widely shared by the majority culture that regards other cultures as threats to its way of life. In those circumstances, hate speech might best be characterized as a pathological extension of majority feelings or beliefs.

So long as the pluralist contemporary state is committed to maintaining diversity, it cannot simply embrace a value-neutral mindset, and consequently it cannot legitimately avoid engaging in some minimum of viewpoint discrimination This is made clear by the German example, and although the German experience has been unique, it is hard to imagine that any pluralist constitutional democracy would not be committed to a similar position, albeit to a lesser degree.[175] Accordingly, without adopting German free-speech jurisprudence, at a minimum, contemporary pluralist democracy ought to institutionalize viewpoint discrimination against the

[174] *See supra* notes 22–29 and accompanying text.

[175] This includes even the United States, which, for all its professed commitment to a free-speech jurisprudence anchored on viewpoint neutrality, has in certain cases upheld restrictions on speech that seem based on viewpoint bias. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 544–45 (1951) (Frankfurter, J., concurring) (characterizing clearly political speech of members of the Communist Party advocating – but not inciting to violence or creating any imminent present danger of – the violent overthrow of the government as speech that ranks "low" "on any scale of values which we have hitherto recognized"). This confuses the *category* of speech involved, namely political speech, which has traditionally been ranked as the highest, and the content of the speech, which had been indeed rejected as repugnant by the vast majority of Americans.

crudest and most offensive expressions of racism, religious bigotry (as opposed to antagonism against religion), and virulent bias on the basis of ethnic or national origin

Rejection of a content-neutral approach to speech does not contravene the four philosophical justifications of free speech discussed earlier, but it does somewhat alter the nature and scope of speech protected under some of them. In terms of the justification from democracy, whereas tolerating hate speech is not inherently at odds with maintaining a free-speech regime compatible with the flow of ideas required to sustain a well-functioning democracy, it is inconsistent with the smooth functioning of a democracy marked by an unswerving commitment to pluralism. Accordingly, the justification from democracy is either regarded as constrained by the need to sustain pluralism, or conceived as linked to a particular kind of democracy grounded in pluralism. In either case, in a polity committed to pluralism, hate speech could not conceivably contribute in any legitimate way to democracy

A similar argument can be advanced in relation to the justification from social contract. Either commitment to pluralism is not subject to alteration through agreement, or it is assumed that preservation of basic individual and collective dignity is in the self-interest of every contractor, and thus not prone to being bargained away in the course of agreeing to any viable pact. Consequently, hate speech could be safely banned without affecting the integrity of the social contract justification.

In view of the earlier discussion of the justification from autonomy,[176] it is obvious that it goes hand in hand with a ban on hate speech so long as the autonomy of speakers and listeners is given equal weight. In other words, if autonomy is taken as requiring dignity and reciprocity, then it demands banning hate speech as an affront against the basic rights of its targets.

Unlike these justifications, the pursuit of truth does not depend on whether or not one embraces pluralism. Nevertheless, if one rejects the presumptions made by Mill and Holmes, the banning of hate speech can be amply reconciled with commitment to the pursuit of truth. The justification for rejecting the Millian and Holmesian presumptions has been persuasively made by the Canadian Supreme Court in the *Keegstra* case.[177] Moreover, banning definitively proven falsehoods, such as unequivocal denial of the Holocaust, cannot conceivably hinder pursuit of the truth.

Opinion-based hate speech may not be as convincingly dismissed, but it is difficult to see how hate speech in form could contribute to furthering the truth. The same cannot automatically be said about the broader message lurking beneath hate based opinion. Thus a racist belief or opinion may be based on fears or concerns that may not themselves be worthless from the standpoint of pursuit of the truth. For example, sentiments against recent immigrants belonging to different races or cultures may

[176] *See supra* note 44 and accompanying text.

[177] *See supra* Subsection IIIA for a discussion of the *Keegstra* case

stem from fears of challenges against one's economic security and cultural values. Whether and to what degree such fears may be warranted are certainly questions that ought to be freely discussed from the standpoint of pursuit of the truth. Consistent with this, special caution should be exercised when dealing with what appears to be hate speech in substance but is not hate speech in form.

From a theoretical standpoint, it is quite possible to draw a bright line between fears and concerns and racist animus. Arguing that immigration from a former colony should be curtailed because it will result in a loss of jobs among the natives and result in undesired changes in the local culture is certainly distinguishable from the hate message that the immigrants in question are "animals" who should be shipped back to their country of origin,[178] even if one recognizes that the former message is implicitly incorporated into the latter. Because of the ambiguity and openness to several inconsistent interpretations of some messages that may plausibly amount to hate speech in substance, the aforementioned line may not always be easy to draw in practice. As we shall examine later, that standing alone does not afford a good reason for tolerating all opinion-based hate speech. In short, whether couched as hate speech in form or as hate speech in substance, expressions of racial animus do not advance the search for the truth and thus do not call for protection from the standpoint of the justification from pursuit of the truth.[179]

Although consistent with the four philosophical justifications of freedom of speech, to become fully acceptable from a practical standpoint, regulation of hate speech must cope satisfactorily with the vexing problems identified in our review of current regulation outside the United States. The principal problems encountered involve line drawing, bias, difficulties in interpretation leading to suppression of speech deserving of protection and/or to toleration of certain hate messages, and facilitation of government- or majority-driven censorship.

Most of these problems are raised in the prevalent American criticism against regulation based on the so-called slippery-slope argument.[180] Pursuant to this argument, because it is impossible to draw neat lines imposing verifiable constraints on judges and legislators, once the door to regulation is open ever so slightly it is bound gradually to open wider, eventually allowing for censorship of all kinds of legitimate yet unpopular speech. Accordingly, failure to confront the slippery-slope problem may lead to dangerous erosion of free speech. Similarly, although the Danish cartoons may be interpreted variously as involving hatred of a religion, hatred of a religious minority, or hatred of those who misappropriate the same religion, it seems sufficiently clear that they should not qualify as actionable hate speech.

[178] *Cf* Jersild v Denmark, App. No 15890/89, 19 Eur. Ct H R Rep 1 (1995) (Commission report). For a discussion of *Jersild*, see *supra* Section IV and accompanying notes

[179] In this connection, it is important to distinguish between *expression* of racial animus and *reporting* such animus Conveying information concerning whether one is a racist, as opposed to uttering racial epithets, can, of course, contribute to discovery of the truth.

[180] *See* Frederick Schauer, "Slippery Slopes," 99 *Harv L. Rev.* 361 (1985)

Unless one adopts a Holmesian view of speech,[181] the slippery-slope argument is largely unpersuasive, and this seems particularly true in the context of hate speech. Indeed, in many cases, such as those involving Holocaust denial, cross burning, displaying swastikas, and calling immigrants "animals," there do not appear to be any line-drawing problems. These cases involve clearly recognizable expressions of hate that constitute patent assaults against the dignity of those whom they target, and that fly in the face of even a cursory commitment to pluralism. On the other hand, there are cases of statements that some groups may find objectionable or offensive, but that raise genuine factual or value-based issues, and that ought, therefore, to be granted protection. For example, strong criticism of the Pope for his opposition to contraception and to homosexual relationships as being "indifferent to human suffering caused by overpopulation and an enemy of human dignity for all" may be highly offensive to Catholics, but even in a country where Catholics are a religious minority should clearly not be officially censored, punished, or characterized as hate speech.

There is, of course, a gray area between these two fairly clear cut areas, in which there are difficult line-drawing problems, as exemplified by the German controversy over the claim that "soldiers are murderers."[182] Line-drawing problems, however, are quite common in law as they tend to arise whenever a scheme of regulation attempts to balance competing objectives. Such problems may well be exacerbated when a fundamental right like free speech is involved, but that justifies, at most, deregulating the entire gray area, not tolerating all hate speech falling short of incitement to violence.

In the last analysis, the best way to deal with the problems likely to arise in connection with regulation of hate speech is to approach them consistently with a set of fundamental normative principles, and in light of key contextual variables. In other words, the standards of constitutionally permissible regulation of hate speech should conform to fundamental principles that transcend geographical, cultural, and historical differences,[183] and at the same time remain sufficiently open to accommodate highly relevant historical and cultural variables. The fixed principles involved are openness to pluralism and respect for the most elementary degree of autonomy, equality, dignity, and reciprocity.[184] The variables, on the other hand, include the

[181] *See supra* notes 39–42 and accompanying text

[182] *See supra* notes 134- 135 and accompanying text

[183] That does not necessarily mean that these are universal, only that they ought to be common to contemporary pluralist constitutional democracies For a more extended discussion of the question of universalism of human rights, see Michel Rosenfeld, 'Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities," 30 *Colum. Hum. Rts. L. Rev* 249 (1999).

[184] This standard establishes a bare minimum, which seems adequate in the context of speech regulation, but not in that of government policy. For example, this standard would allow for criticism of a particular religion on the grounds it is too restrictive, an enemy of progress, or indifferent to the rights of women. Although these statements may offend believers, it cannot be fairly said that they deprive them of the

particular history and nature of discrimination, status as minority or majority group, customs, common linguistic practices, and the relative power or powerlessness of speakers and their targets within the society involved.

To minimize difficulties and to reduce the possibility of bias, regulation of hate speech should focus on efforts to reconcile the fixed principles and the relevant variables. This focus should determine, among other things, how far within the gray area regulation should extend. Thus, for example, given their different historical experiences with anti-Semitism, it seems reasonable that Germany should go further than the United States in prohibiting anti-Semitic speech that falls within the gray area. Although American and German Jews are entitled to the same degree of dignity and inclusion within their respective societies, greater restrictions on anti-Semitism are required in Germany than in the United States to achieve comparable results.

Recourse to the aforementioned approach is also likely to minimize bias in the regulation of hate speech. One way in which this can be achieved is by taking into account historically significant differences between the proponents and intended targets of hate messages. Thus, racist speech by a member of a historically dominant race against members of an oppressed race is likely to have a more severe impact than racist speech by the racially oppressed against their oppressors. Even if this does not justify selective regulation of hate speech, it does call for greater leniency when the racially oppressed is at fault, and for taking into account as a mitigating factor the fact found in some of the British cases discussed earlier[185] – that the racist speech of a member of an oppressed racial group was in response to the racism perpetrated by members of the oppressor race. Furthermore, if these contextual variables are properly accounted for, it becomes less likely that majority biases will dominate prosecutorial or judicial decisions.

CONCLUSION

Hate speech raises difficult questions that test the limits of free speech. Although none of the constitutional regimes examined in these pages leaves hate speech unregulated, there are vast differences between the minimal regulation practiced in the United States and the much more extensive regulation typical of other countries and of international covenants. Both approaches are imperfect, but in a world that has witnessed the Holocaust, various other genocides, and ethnic cleansing, all of which were surrounded by abundant hate speech, the American way seems definitely less appealing than its alternatives. As hate speech can now almost instantaneously spread throughout the world, and as nations become increasingly socially, ethnically, religiously, and culturally diverse, the need for regulation becomes ever more urgent.

most elementary degree of dignity. However, a government policy attacking such religion, or making it difficult for its adherents to freely practice it would require meeting a much higher standard.

[185] *See supra* Subsection IIIB.

In view of these important changes, the state can no longer justify commitment to neutrality, but must embrace pluralism, guarantee autonomy and dignity, and strive for maintenance of a minimum of mutual respect. Commitment to these values requires states to conduct an active struggle against hate speech, while at the same time avoiding the pitfalls bound to be encountered in the pursuit of that struggle. It would, of course, be preferable if hate could be defeated by reason. Unfortunately, that has failed all too often, so there seems no alternative but to combat hate speech through regulation to secure a minimum of civility in the public arena.

16

Hate Speech and Political Legitimacy

Jeremy Waldron

Proposals to ban hate speech are sometimes met with the objection that the restrictions on free speech that they envisage will undermine the legitimacy of the political system that imposes them. I have defended the idea of such restrictions elsewhere,[1] and in this chapter I consider whether this worry about legitimacy constitutes a serious objection.

There are a number of arguments in the literature that link the protection of free expression to the flourishing of self-government in a democracy. Some say little more than that, though they say it sonorously and at great length.[2] In a few of these arguments, however, the position is advanced beyond a general concern for the democratic process. It is sometimes said that a free and unrestricted public discourse is a *sine qua non* for political legitimacy in a democracy.[3] Robert Post makes this argument.[4] Some sharpen the point yet further, arguing that the political legitimacy of certain specific legal provisions and institutional arrangements may be imperiled by the enactment and enforcement of hate speech laws.

I DWORKIN ON LEGITIMACY

The most powerful argument of this kind is presented by Ronald Dworkin, in a "Foreword" he contributed to a large, recent, and valuable volume entitled *Extreme*

[1] *See* Jeremy Waldron, "Dignity and Defamation: The Visibility of Hate (2009 Oliver Wendell Holmes Lectures)," 123 *Harv. L. Rev.* 1596 (2010). The present chapter is drawn from Section III of that article.

[2] *See, e.g.*, Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 26 (The Lawbook Exchange 2000) (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government.")

[3] *See, e.g.*, James Weinstein, "Extreme Speech, Public Order, and Democracy: Lessons from *The Masses*," in *Extreme Speech and Democracy* 28, 38 (Ivan Hare & James Weinstein eds., Oxford University Press 2009).

[4] Robert C. Post, "Racist Speech, Democracy, and the First Amendment," 32 *Wm. & Mary L. Rev.* 267, 279–83 (1991).

Speech and Democracy, edited by James Weinstein and Ivan Hare.[5] According to Professor Dworkin, freedom for hate speech or group defamation is the price we pay for enforcing the laws that the haters and defamers oppose (for example, laws forbidding discrimination). Here is how the argument goes.

Dworkin agrees that it is important for the law to protect people, particularly vulnerable minorities, from discrimination, from "unfairness and inequality in employment or education or housing . . . for example."[6] He is as committed to these laws as any proponent of racial equality. Like them, however, he acknowledges that if we adopt such laws, often it will have to be over the opposition of a few people who favor discrimination. Now, we usually say that it is enough that such laws be supported by a majority of voters or elected representatives, provided that the opponents of the bills are not disenfranchised from that process. But actually, says Dworkin, that is not all that is required:

> Fair democracy requires . . . that each citizen have not just a vote but a voice: a majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals, not just in the hope of influencing others (though that hope is crucially important), but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action.[7]

Free expression, in other words, is part of the price we pay for political legitimacy: "The majority has no right to impose its will on someone who is forbidden to raise a voice in protest . . . before the decision is taken."[8] If we want *legitimate* laws against violence or discrimination, we must let their opponents speak. And *then* we can legitimize those laws by voting.

Now, some of the opponents of antidiscrimination laws will have no desire to express their opposition hatefully. But some may: For them, defaming the groups that these laws are supposed to protect is the essence of their opposition. Professor Dworkin's position is that it does not matter how foul and vicious the hatemongers' contribution is. They must be allowed their say. Otherwise no legitimacy will attach to the laws that are enacted over their opposition. It does not even matter that the hatemonger's speech is not couched as a formal contribution to political debate. A community's legislation and policy, says Dworkin, are determined as much by its moral and cultural environment, the mix of people's opinions and prejudices, as by stump political speeches.[9] It is as unfair to impose a collective decision on someone who has not been allowed to contribute to that moral environment by expressing one's social convictions or prejudices as on someone whose political

[5] Ronald Dworkin, "Foreword" to *Extreme Speech and Democracy*, *supra* note 3, at v–ix.
[6] *Id.* at viii.
[7] *Id.* at vii.
[8] *Id*
[9] *Id* at viii.

pamphlets against the decision were destroyed by the police. Whether scrawled on the walls, smeared on a leaflet, painted up on a banner, spat out onto the Internet, or illuminated by the glare of a burning cross, even the most hateful message has to be allowed to make its presence felt in the maelstrom of messages that populate the marketplace of ideas.[10]

And so, Dworkin's legitimacy argument boils down to this. We want to protect people with laws against discrimination and violence, and it is natural to want to legislate also against the causes of discrimination and violence. (I should mention that Professor Dworkin has his doubts about some of the causal claims made by defenders of hate speech laws: "Many of these claims are inflated," he says, "and some are absurd."[11] But I shall leave that aside as a separate line of attack.) Yet even if the defenders of hate speech laws are right, and such speech does lead to despair and violence and discrimination, there is only so much we can do about speech with such consequences without forfeiting the legitimacy of the laws we most care about. We can legislate against direct incitement to imminent violence, but (says Dworkin)

> [W]e must not try to intervene further upstream, by forbidding any expression of the attitudes or prejudices that we think nourish . . . inequality, because if we intervene too soon in the process through which collective opinion is formed, we spoil the only democratic justification we have for insisting that everyone obey these laws, even those who hate and resent them.[12]

The structure of the position is interesting. Professor Dworkin notices that arguments about hate speech often involve two sorts of laws, not one. On the one hand, there are the hate speech laws themselves – or the proposals that people would like to see enacted – regulations restricting expressions of racial or religious hatred, group defamation, and so on. On the other hand, there are laws in place protecting the people who are supposedly also protected by hate speech laws – I mean laws against discrimination, laws against violence, and so on. Following Dworkin's metaphor, I am going to call these *upstream laws* and *downstream laws*, respectively.[13]

Those who support the upstream laws often say that they are necessary to address the causes of downstream laws – if we leave hate speech alone, then we are leaving alone the slow-acting poison that leads to violence and discrimination. Professor Dworkin turns the tables on this argument by saying that if we interfere coercively upstream, we undermine political legitimacy downstream. That, he thinks, is a cost that even the defenders of hate speech legislation should not be willing to incur.

[10] *Id*
[11] *Id* at vi. *See also* Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 230 (Oxford University Press 1996) (expressing similar skepticism about the empirical claims of feminist writers, such as Catherine MacKinnon, about the harms caused by pornography).
[12] Dworkin, *supra* note 5, at viii.
[13] *Id*

II. IS LEGITIMACY A MATTER OF DEGREE?

How should we respond to this argument? There is no doubt that Dworkin has drawn attention to a troubling consequence of legislation forbidding hate speech. But how serious are these consequences? It is difficult to tell because "legitimacy" is a vague term, and there is a question about what "spoiling" the legitimacy of these laws actually amounts to.[14] In social science, legitimacy often involves little more than the fact of popular support.[15] Professor Dworkin means it, however, as a normative property – either the existence of a political obligation to obey the laws or the appropriateness of using force to uphold them.[16] Whichever of these is meant, there is a question of how literally we should take the claim that legitimacy is spoiled by the enforcement of hate speech laws. For example, I know that Dworkin does not mean that racists are entitled to rise up in revolution against a society that enforces hate speech regulation. It is not a loss of legitimacy in that drastic sense.[17] A freely elected regime that enacts hate speech limits and then antidiscrimination laws is not illegitimate in the same way as (say) a military dictatorship that toppled a democratically elected government.

At worst, restrictions on hate speech lead to a loss of legitimacy in relation *to these particular laws* rather than a catastrophic loss of legitimacy for the political system generally. Even with that limitation, however, the position seems counterintuitive. In Britain, there are laws forbidding the expression of racial hatred.[18] There are also laws forbidding racial discrimination, not to mention laws forbidding racial and ethnic violence and intimidation,[19] and laws against criminal damage protecting mosques and synagogues from desecration.[20] These are the downstream laws, the laws whose legitimacy Dworkin believes is hostage to the enforcement of hate speech regulation. Should we really believe that in Britain citizens have no obligation to obey these downstream laws? Or should we really believe that the enforcement of these downstream laws is morally wrong and that the use of force to uphold them is just like any other illegitimate use of force?

For example: A wealthy landlord discriminates against English families of South Asian descent in violation of the Race Relations Act. Do we really want to say that he has no obligation to obey the antidiscrimination law and that no action should be taken against him, at least so long as the statute book also contains provisions banning him from publishing virulent anti-Pakistani views? Suppose some skinheads

[14] It will be obvious in what follows that I am greatly indebted to Professor Dworkin for discussing with me the ideas in this part of the chapter.

[15] *See, e.g.*, Max Weber, *Economy and Society* 212–15 (Guenther Roth & Claus Wittich eds., University of California Press 1978).

[16] *See* Ronald Dworkin, *Law's Empire* 190–2 (Belknap Press of Harvard University Press 1986).

[17] Email from Ronald Dworkin to the author (Oct. 4, 2009, 21:34 EST).

[18] Public Order Act, 1986, c. 64, §§ 3, 3A.

[19] Race Relations Act, 1976, c. 74, § 70.

[20] I refer here to the basic criminal law prohibitions on damaging property.

beat up a Muslim minicab driver in the wake of the 7/7 atrocities. Is it wrong for the police to pursue, arrest, and indict these assailants because Britain has religious hate speech laws that deprive downstream laws forbidding this sort of assault of their legitimacy? Must they stand by and not intervene because any intervention would be wrong? On a literal account, that is what "deprived of legitimacy" means. It is not just Britain. Almost every advanced democracy has hate speech laws, which, according to Dworkin, spoil the legitimacy of any antidiscrimination laws that they have.[21] It would seem that the only advanced democracy entitled to have and enforce such laws is the United States. Can that be right? That is American exceptionalism with a vengeance!

I do not think Professor Dworkin really means us to take the phrase "spoil the only democratic justification we have for insisting that everyone obey" the downstream laws in this literal sense.[22] It is said that any argument will look silly if "it is pushed to an extreme."[23] So let us consider some more moderate possibilities. One possibility is that the enforcement of hate speech laws undermines the legitimacy of some downstream laws and not others: Perhaps it undermines the legitimacy of laws forbidding discrimination but not the legitimacy of laws forbidding racial violence or criminal damage. They, after all, have independent and more general support. Police intervention to stop violence or rescue people from attack may not need the sort of legitimation that the majoritarian political process is supposed to provide, or they may not need to be legitimated through a no-holds-barred society-wide discussion of race. But this position will be hard for Dworkin to maintain in light of his more holistic observations about the importance for legitimacy of speech that is just part of the cultural environment, although not intended as a contribution to formal discussion of any particular law.[24] Anyway, it still leaves us stuck with the unpalatable conclusion so far as antidiscrimination laws are concerned.

A second possibility (compatible with the first) is that the legitimacy of any given law is itself a matter of degree and that, on the moderate version of Dworkin's argument, the enforcement of hate speech laws *diminishes* the legitimacy of other laws without destroying it altogether. I will address this possibility in a moment.

A third possibility (also compatible with the other two) is that legitimacy is relative to persons. Robert Post has suggested a version of this: "If the state were to forbid the expression of a particular idea, the government would become, *with respect to individuals holding that idea*, heteronomous and nondemocratic."[25] In Dworkin's argument, one might say the downstream law becomes legitimately unenforceable

[21] *See* Dworkin, *supra* note 5, at viii.

[22] *Id.*

[23] *Cf.* John Stuart Mill, *On Liberty* 26 (Currin V. Shields ed., Liberal Arts Press 1956) (1859) ("Strange it is that men should admit the validity of the arguments for free discussion, but object to their being 'pushed to an extreme' not seeing that unless the reasons are good for an extreme case, they are not good for any case.")

[24] *See* Waldron, *supra* note 1, at 1641.

[25] Post, *supra* note 4, at 290 (emphasis added).

against the person silenced by the upstream law even though it may be legitimately enforceable against others. But this third possibility gets tangled up in issues about generality. Hate speech laws are presented in quite general terms: They forbid *anyone* from hateful defamation of racial, ethnic, and religious groups. Even if they only have to be enforced against a few isolated extremists, they have (and are intended to have) a chilling effect on everyone's speech. To the extent that this is so, it may be hard to identify the basis for the sort of narrowly focused *in personam* illegitimacy of the type that the third moderate possibility suggests.

The second moderate position seems the most plausible. Legitimacy is not an all-or-nothing matter, the existence of hate speech laws diminishes the legitimacy of downstream laws but does not eliminate it all together. Dworkin puts it this way:

> [T]here is something morally to regret when we enforce general nondiscrimination laws against racists who were not allowed to influence the formal and informal political culture as they wished to do. On balance Britain is entitled to enforce such laws, I think, but we are left with a deficit in legitimacy – something to regret under that title – because of the censorship.[26]

So it is all a matter of degree:[27] The "something to regret" might be more or less considerable; the "deficit in legitimacy" might be larger or smaller.

However, if we are going to recognize differences of degree, we should recognize them on the other side of the equation as well. Let me explain. An individual, X, may oppose something – say, an antidiscrimination law – for a range of reasons:

1. He may oppose it because he thinks it will make him worse off.
2. He may oppose it because he thinks it will generate perverse economic incentives, undermining economic efficiency or otherwise reducing the general welfare.
3. He may oppose it because he distrusts the bureaucracy necessary to administer it.
4. He may oppose it because he denies that the intended beneficiaries of the law are worthy of the protection that it offers them.

Let us focus particularly on (4). Position (4) may be expressed by its proponent in various ways:

4a. X may simply express his dissent from the broad abstract principle that individuals must show equal concern and respect to all members of the community.

4b. X may expound some racial theory that he thinks shows the inferiority, by certain measures, of certain lines of human descent.

[26] E-mail from Ronald Dworkin, *supra* note 17.

[27] For a more general acknowledgment that legitimacy is a matter of degree, see Ronald Dworkin, *Is Democracy Possible Here?* 97 (Princeton University Press 2006).

4c. X may express the view that those who are intended to be protected by the antidiscrimination law are no better than animals.

4d. X may say in a leaflet or on the radio that those who are intended to be protected by the antidiscrimination law are no better than the sort of animals we would normally seek to exterminate, like rats or cockroaches.

Out of all these various views and expressions, laws against hate speech and group defamation – of the kind we are familiar with in actually existing democracies – are almost certain to restrict (4d), quite likely to restrict (4c), and maybe they will restrict some versions of (4b), depending on how hatefully these views are expressed.

On the other hand, most such laws bend over backward to ensure that there is a lawful way of expressing something like the propositional content of views that become objectionable when expressed as vituperation. They try to define a legitimate mode of roughly equivalent expression, a sort of safe haven for the moderate expression of the gist of the view whose hateful or hate-inciting expression is prohibited. The most generous such provision of which I am aware is in the Australian Racial Hatred Act 1995 (that is a federal statute for the Australian Capital Territory, comprising the city of Canberra and its environs), which provides that its basic ban on actions that insult, humiliate, or intimidate a group of people done because of the race, color, or national or ethnic origin "does not render unlawful anything said or done reasonably and in good faith: . . . in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest."[28] The purpose of these qualifications is precisely to limit the application of the restriction to the bottom end of something like a (4a)–(4d) spectrum.

Now if we accept the basic framework of Professor Dworkin's position, we may want to say that a law that prohibited the expression of (4a) and (4b) as well as (4c) and (4d) would have a worse effect on downstream legitimacy than a law that merely forbade something like (4d). It would – as I have argued – be a matter of degree. And if we had a law that was specifically tailored to prohibit only expression at the viciously vituperative end of this spectrum, it might be an open question whether it had anything more than a minimal effect on legitimacy.

Part of our estimation of the effect on legitimacy would surely also revolve around the reasonableness and importance of the objectives being sought by the restrictive upstream laws. We see this all the time with regard to *non*-content-based restrictions on speech (laws restricting time, place, and manner of political demonstrations, for example). If they are arbitrary or motivated by only very minor considerations of

[28] Racial Hatred Act, 1995, § 18D. See also section 18(1)(a) of the Public Order Act 1986 (UK), which prohibits the display of "any written material which is threatening, abusive or insulting" if its display is associated with an intention "to stir up racial hatred," but says that no offense is committed if the same material is not presented in a threatening, abusive, or insulting manner or if the person concerned "did not intend . . . the written material, to be, and was not aware that it might be, threatening, abusive or insulting."

public order, we might say that they gravely impair the legitimacy of collective decisions on the matters that the demonstrators wanted to address. But if the motivation is based on serious considerations of security, we might be more understanding. Something similar may be true in the case of hate speech laws. A motivation oriented purely to protect people's feelings against offense is one thing. But a restriction on hate speech oriented to protecting the basic social standing – the "elementary dignity," as I put it in the Holmes Lectures[29] – of members of vulnerable groups, and to maintaining the assurance they need to go about their lives in a secure and dignified manner – that may seem like a much more compelling objective. And complaints that attempts to secure it damage the legitimacy of other laws may be much less credible as a result.

III. TIME AND SETTLEMENT

We would not do justice to Dworkin's argument without discussing one much more difficult and challenging response to it. What I want to say here is difficult and (I believe) thought-provoking, and because I am not at all sure about it, I want to appeal to the patience and consideration of my readers. Let me begin with a couple of reminders

The concern for dignity and reputation that I think is at stake in the debate over hate speech engages the basics of justice and rights, not the contestable elements such as (for example) theories of economic equality.[30] If the proposal were to ban people from expressing contemptible views about welfare recipients or democratic socialists, then I think there would be a case to be made along the lines of Professor Dworkin's argument – to the effect that such suppression would put in question the legitimacy of our pursuit of policies based on premises that people were being fined or put in jail for (vituperatively) denying. But we are, as I said, talking about the fundamentals of justice, not the contestable elements. By the fundamentals of justice, I mean things like elementary racial equality, the basic equality of the sexes, the dignity of the human person, freedom from violence and intimidation, and the like. These matters are foundational in two senses. On the one hand, they represent things that people rely on comprehensively and diffusely in almost every aspect of their dealings with others. If one cannot exact respect for one's basic status as a rights-bearing individual, then almost everything is thrown into question. On the other hand, they are also fundamental in the sense that they represent relatively settled points or premises of modern social and legal organization.[31] I do not mean that there is literal unanimity about them – the hatemongers show *that*. Still, these matters are more or less settled in the laws and constitutions of most modern democracies,

[29] *See* Waldron, *supra* note 1, at 1605, 1646.

[30] *Cf. id.* at 1626–7

[31] For a helpful characterization of this settlement – in relation to racial equality – see David Kretzmer, "Freedom of Speech and Racism," 8 *Cardozo L. Rev.* 445, 447 (1987).

and so it is not just morally necessary but also quite reasonable now for us to treat them as foundations for an awful lot else that we do. A debate can be over in the sense that intelligent opinion has settled the matter, and it is inconceivable that public policy could proceed on any other basis, even though there remain dangerous enclaves of politically powerless but socially destructive outliers who do what they can to undermine the furnishing of assurances to members of racial minorities based on these settlements. So banning hate speech should not be understood as a way of influencing a great national debate about racial or sexual equality or religious tolerance, nor should it be seen as a way of contributing to the ending of that debate (as though without the intervention of these laws the racists might win). As I argued in the Holmes Lectures, the evil that hate speech legislation seeks to remedy is not the evil of the racists' thinking or believing certain things. Rather, it is the evil of these racists' attempts to create the impression that the equal position of members of vulnerable minorities in a rights-respecting society is less secure than is implied by the society's actual foundational commitments.[32]

Maybe there was a time when modern democracies had to have a great national debate about *race* – about whether there were different kinds of human beings, inferior and superior lines of human descent, ranked in hierarchies of capability, responsibility, and authority.[33] But I think it is fatuous to suggest that we are in the throes of such a debate now – a vital and ongoing debate of a sort that requires us to endure the ugly invective of racial defamation as a contribution in our continuing of a more or less open question. There is a sense in which the debate about race is over – won, finished. There are outlying dissenters, but we are moving forward as a society as though this were no longer a matter of serious or considerable contestation. The basis on which we move forward is that the settling of this debate is fundamental to almost every aspect of the well-being, dignity, and security of formerly vulnerable minorities. On issues like affirmative action, we continue to debate ways of moving forward on the basis of the settled conviction that racism is wrong, but we are no longer in need of a continuing debate about the fundamental *premises* of that argument.

If anything like this is true, then there is something odd about Professor Dworkin's legitimacy argument. The impression he gives is that the discourse to which racist hatemongers offer their "contributions" is a living element of public debate, on which we divide temporarily into majorities and minorities, but in respect to which no majoritarian laws can be legitimate unless there is some provision for this important debate to continue on a no-holds-barred basis, so that the losers (the racist and the bigots) have a chance to persuade the majority of their position on these fundamentals the next time around. One can see what Dworkin means; I wonder,

[32] *See* Waldron, *supra* note 1, at 1627–31

[33] *See, e.g.*, Ivan Hannaford, *Race: The History of an Idea in the West* 277–368 (Johns Hopkins University Press 1996).

however, if you share my sense of how *weird* his position is. It seems to assume that debates are timeless and that considerations of political legitimacy relative to public debate must be understood as necessarily impervious to progress.

Maybe you do not share my sense of the weird artificiality of this position. I understand the delicacy of any claim that a debate is over and finished, and that therefore attempts to throw in question a position that most of us have accepted should be suppressed. To clarify: This idea of a debate being *over* is used only with reference to this question of how seriously we should regard the Dworkinian alarm about political legitimacy, particularly in light of Professor Dworkin's own acknowledgment that the effect of hate speech laws on legitimacy is a matter of degree. The legitimacy impact of restricting debate about an issue that is live and open seems to me quite a different matter from the legitimacy impact of restricting continued debate about a foundational issue that was settled effectively decades ago. It is with regard to that, and that only, that I introduce this idea of certain debates being *over* into the discussion.

I am mindful of John Stuart Mill's point about the importance of sustaining a "living apprehension" of the truths on which our social system is organized, even when certain debates are, to all intents and purposes, settled.[34] Most of us, however, part company with Mill when he seems to suggest that it might be appropriate to cultivate racism, for instance, to enliven our egalitarian convictions.[35] I mean that most of us would agree with Mill when he says

> [a]s mankind improve[s], the number of doctrines which are no longer disputed . . will be constantly on the increase, and the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested. The cessation, on one question after another, of serious controversy is as salutary in the case of true opinions as it is dangerous and noxious when the opinions are erroneous.[36]

We can accept that without necessarily accepting his claim that this brings with it a certain cost – namely, "[t]he loss of so important an aid to the . . . living apprehension of a truth as is afforded by the necessity of . . . defending it against[] opponents."[37] Mill concedes that this is not sufficient to outweigh the benefit of the universal recognition of some truth, but he says it is "no trifling drawback."[38] He even suggests that if we did not have local racists to keep our egalitarianism alive and jumping, we might have to invent them.[39] Most people, I think, are very chary of that rather daft suggestion by Mill, particularly when the effect of manufacturing or empowering a

[34] Mill, *supra* note 23, at 48–55.
[35] *See id.* at 53–5.
[36] *Id.* at 53.
[37] *Id.*
[38] *Id.*
[39] *See id.* at 54.

"dissentient champion"[40] is not only to perpetuate an (already completed) debate but also – and recklessly or destructively – to do so at the expense of the dignity, security, and assurance of vulnerable members of society.[41]

Let me emphasize again that the argument of this section is developed, not as a freestanding position, but as a response to Professor Dworkin's argument about legitimacy. I think we are now past the stage where we are in need of such a robust debate about matters like race that we ought to bear the costs of what amount to attacks on the dignity of minority groups – or, more importantly, *require individuals and families within those groups* to bear the costs of such humiliating attacks on their dignity and social standing – in the interests of public discourse and political legitimacy. I believe we are well past the point where we would sacrifice the legitimacy of our antidiscrimination laws or the laws prohibiting racial violence by not permitting people to defame one another in these terms.

IV. CALLING THE BLUFF

Legitimacy is not a straightforward concept, by any means. It is used loosely in ordinary speech, and its usage in political philosophy is also quite varied. As political philosophers, it is supposed to be our job to use this term carefully, with a good sense of what it entails and what its conditions are. I said at the beginning of this chapter that some arguments in the literature about the connection between hate speech laws and political legitimacy offer only the loosest and most platitudinous account of the connection. I focused on Professor Dworkin's argument because it seemed to be a little sharper than that – giving us a reasonably clear account of the reasons why we might say that enforcing hate speech laws diminishes political legitimacy elsewhere in the legal system. I hope I have done justice to Dworkin's claim.

Where his argument overreaches is in its failure to qualify the claims that are made about how serious the legitimacy loss might be (supposedly arising out of the operation of hate speech laws). As Professor Dworkin presented it in the "Foreword" to *Extreme Speech and Democracy*, the claim seemed to be that the legitimacy loss would be ruinous: "[W]e spoil the only democratic justification we have for insisting that everyone obey these laws [against discrimination], even those who hate and resent them."[42] Dworkin was content to leave it at that in the "Foreword," and those who share his opposition to hate speech laws seem happy to accept this claim at face value,[43] hoping presumably that people otherwise inclined to stand up for such

[40] *Id.*
[41] *See* Frederick Schauer, "Social Epistemology, Holocaust Denial, and the Post-Millian Calculus," Chapter 7 herein ("It is a serious omission of Mill's that he rarely, if ever, considers the possibility of suppression for reasons other than the alleged falsity of the suppressed view[.] . . neglecting the possibility that various non-epistemic benefits might be worth the cost of some epistemic loss . . .")
[42] Dworkin, *supra* note 5, at v...
[43] *See* Weinstein, *supra* note 3, at 28 n. 19.

laws will not examine it too closely. However, when the position is scrutinized, there is a precipitate retreat by its main proponent to a much more moderate claim – hate speech laws may diminish the legitimacy of downstream laws (or they may lead to something of a "deficit" in legitimacy) even though they do not "spoil" the legitimacy of these laws altogether. Indeed, under pressure, the retreat is to a claim that may be of vanishing significance in relation to laws of the kind that we are realistically considering and actual public debates of the sort in which such laws typically intervene. Think of this chapter, then, as an exercise in resistance to browbeating. There may be a case to be made against hate speech laws, but it needs to be made with greater care than this.

17

Reply to Jeremy Waldron

Ronald Dworkin

Professor Waldron believes that I beat a "precipitate retreat" from an earlier position in an email to him commenting on an argument he made.[1] He has called my "bluff" and resisted my "browbeating." I did not intend the email for publication, but I cannot find any retreat there. I had said, in the "Foreword" Waldron cites, that a law criminalizing "hate" speech "spoils the democratic justification we have for insisting that everyone obey."[2] I said, in the email Waldron decided to quote, that such laws leave us with "something morally to regret" and with "a deficit in legitimacy." In an earlier book Waldron cites, I said that legitimacy is a matter of degree, and that not every law that is "spoiled" by a defective democratic process justifies citizen rebellion.[3] Claiming that an opponent has retreated is often a useful rhetorical device, but it seems unpersuasive in this case. We can hardly justify a defect in political legitimacy by arguing that it might have been worse.

Waldron appears to accept, at least in this essay, that it is indeed a defect in legitimacy to enforce legislation against those who were not permitted to speak in opposition during the political process that produced that legislation, that this does "spoil" the democratic pedigree of the legislation to some degree. If the legislation in question required everyone to carry health insurance, for example, then suppression of even "vituperative" dissent would put the legitimacy of that law "in question." He thinks hate speech different, apparently, for two reasons. One of these – that issues of racial dignity have been settled in mature democracies – is doubtful, and Waldron offers it with what seems great hesitation. Well he might. These issues seem much less settled now – in Germany and the Netherlands, for example, as well as in Britain and the United States – than they seemed decades earlier. The other reason Waldron

[1] *See* Jeremy Waldron, "Hate Speech and Political Legitimacy," Chapter 16 here.n All references to Waldron are to this chapter

[2] Ronald Dworkin, "Foreword," in *Extreme Speech and Democracy* v (Ivan Hare & James Weinstein eds., Oxford University Press 2009).

[3] Ronald Dworkin, *Is Democracy Possible Here?* 97 (Princeton University Press 2006)

offers is interesting, however; it touches a very deep issue in political philosophy. What is the basis of the "equal concern and respect" that coercive government owes those who fall under its dominion?

Waldron seems to assume that *government* owes equal concern and respect to all members of the political community because every *member* of the community does, even as a private individual. He suggests that racists dissent "from the broad abstract principle that individuals must show equal concern and respect to all members of the community." Given that we ourselves accept that principle, Waldron argues, the phenomenon of hate speech requires balancing. On the one hand, government does compromise legitimacy – it fails to treat racists with the kind of respect any justification of democracy assumes – when it obstructs their participation, on their own terms, in the democratic process. In that sense, hate speech is like vituperative opposition to health care legislation: In both cases, censorship would compromise legitimacy. But hate speech is different because vituperative hate speech also denies some citizens – its targets – the equal concern and respect they are entitled to have *from other citizens*. So balancing is necessary: Censorship of the worst forms of hate speech, at least, is justified on balance because the damage such speech does to the respect owed its targets outweighs the damage done to racists by compromising their democratic rights.

But the "abstract principle" that supposedly grounds this argument is mistaken: It fails to notice the crucial difference between the rights and responsibilities of government – our responsibilities when acting collectively and coercively in politics – and our responsibilities as individuals operating within the structure of coercive law. Government must treat the fate of each citizen as of equal importance. But I need not: I do not owe you or your children the concern, when I act as an individual deploying my own resources, that I show to my own children or to myself. Government may not adopt any ethical conviction – any opinion about the true basis of human dignity – and enforce that view against dissenting citizens. It must recognize a right of ethical independence. But recognizing that right means that no individual citizen may be forced to accept any official ethical conviction or be prevented from expressing one's own dissenting convictions. It is a popular view, for instance, that atheists cannot be trusted because they have no beliefs that can ground a moral commitment. I find that opinion deeply offensive because it denies my status as a moral agent, and moral agency is a matter that, as Waldron puts it, "people rely on comprehensively and diffusely in almost every aspect of their dealings with others." No law would be acceptable, no matter how popular, that rested on that ethical opinion. But I have no right that others, who *do* believe I lack that basic dignity, not hold or express that conviction as individuals. Living in a just society – a society whose government respects human dignity – means that I must accept the right of others to hold me in contempt.

So regulating hate speech is not, after all, a matter of balancing. Government may not violate the rights of any citizen to the ethical independence from government that dignity requires. It is no excuse that it does so to enforce a particular collective opinion about what forms of respect individual human beings owe one another just as human beings; that "excuse" only confirms the mistake. I myself believe that one opinion about that latter issue is correct and others mistaken. But it does not lie within the powers of just government to try to identify and impose that truth.[4] To be sure, life would be more pleasant for some members of the community – and less pleasant for others – if government had that power. But a government is not fully legitimate that claims it.

I have some other, less central, comments about Waldron's essay. I agree with him, first, that my argument does not suppose that "laws against racial violence or criminal damage" are in any way compromised when expressions of racial hatred are banned. I do not, however, understand why he thinks they might be. He suggests, second, that censorship of "hate" speech is comparable to "time, place, and manner" restrictions on political demonstrations. But the latter are permissible only when they are, as constitutional lawyers put it, "content neutral."[5] Justifications for time, place, and manner restrictions are not based on any judgment, as censorship of race speech must be, that the speech restricted is false or offensive.

I am surprised, third, that he seems to argue only for banning the crudest forms of hate speech: speech that declares that some people are no better than the animals "we would normally seek to exterminate, like rats or cockroaches." That is not the danger; no person or political party that hoped to attract support or attention would speak in that way. If Waldron's case for censorship of hate speech is to count in actual politics, it must reach what is actually said and feared. "The holocaust was invented by Jews for their own advantage." "Moslems are all terrorists who should be shunned." "Islam has contributed nothing of value to the world's culture." "The immigration of alien races will destroy the indigenous culture that we, who have developed and embraced that culture, have a right to protect." "They should all be sent back where they came from." None of these misbegotten declarations implies that any human being is no better than an animal or should be exterminated like a cockroach. None implies that anyone inherently lacks the status or dignity of a human being. Any argument that hopes to defend the hate speech laws actually in force in European countries must defend censorship of the kind of speech that is actually used to inspire hatred.

Europeans have said to me, on many occasions, that their history is different from and darker than that of the United States, and that if I had been born in Europe, I would share their opinion rather than the reflex First Amendment tic they think an

[4] In *Justice for Hedgehogs* (Harvard University Press 2011), I argue for what I take to be the correct account of what kind of respect people owe each other as individuals, and I describe what I believe to be the ethical, moral, and political consequences of that view. But I also argue there, at some length, for a right of personal independence from coercive government in the ethical as distinct from the moral sphere.

[5] E.g., Ward v. Rock Against Racism, 491 U.S. 781, 790–4 (1989).

American disease.[6] They may be right about the impact of history on conviction. A great many distinguished and otherwise liberal European political philosophers do support censorship in this area, although of course others do not. In any case, however, explanation of a conviction's genesis is not an argument for its truth.

[6] Stephen Holmes's comments in this volume take something of the same view. *See* Stephen Holmes "Waldron, Machiavelli, and Hate Speech," Chapter 18 herein

18

Waldron, Machiavelli, and Hate Speech

Stephen Holmes

I

I am not particularly knowledgeable about the subject of hate speech. I am not a philosopher at all. Yet Peter Molnar has pursued me persistently to contribute to this project. I could not understand why he kept calling me up and sending me emails telling me I should speak on a subject I know nothing about. I finally realized that the answer had to be that I once bumped into him at Washington Square Park and we had a conversation about hate speech.

That conversation took us back to the mid-1990s, when I heard Ronald Dworkin lecture in Budapest. Dworkin was speaking, of course, a few hundred miles away from the Balkan tragedy, where hundreds of thousands of people were killed on the basis of violent hate ideologies, and on a continent in which a hundred million people were killed in that century on the basis of violent hate ideologies. My recollection is that he argued for total freedom to express hatred of other people, without considering this context.

It does not take Sigmund Freud to understand that, if you have two continents, in one of which one hundred million people were killed on the basis of highly violent hate ideologies, accompanied and propelled by extreme hate speech, and in the other of which, at least by comparison, basically nothing happened, you will get different judicial traditions. This is not a *legal* point; it simply reflects the fact that what drives people most in their judgments is their own experience – or, to be precise, their remembered experience. When you forget about the Great Depression, then you say, "Well, government doesn't need to regulate the banks anymore." When you forget about the Vietnam War, you can say, "We should go over to Iraq." So, what you remember – your experience – is far more consequential than norms or philosophies.

This is a revised transcription of remarks delivered on March 25, 2009, at the Cardozo School of Law, largely as a response to a presentation by Jeremy Waldron based on his chapter in the current volume

24

A Survey and Critical Analysis of Council of Europe Strategies for Countering "Hate Speech"

Tarlach McGonagle

I. INTRODUCTION

The Council of Europe is a regional intergovernmental organization committed to ensuring respect for human rights, democracy, and the rule of law throughout Europe. Its current membership is forty-seven states. Its primary aim, as set out in its statute, is to "achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress."[1] It pursues this aim "through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realization of human rights and fundamental freedoms."[2]

The Council employs a number of concurrent strategies to counter "hate speech." These strategies have been developed pursuant to the Council's various treaties and other standard-setting and monitoring initiatives. While they are broadly congruent in terms of their overall objectives and approaches, each initiative is characterized by its own priorities, emphases, and procedural possibilities. This has resulted in considerable diversity in the range of strategies devised by the Council to combat "hate speech." They include: the denial or reduction of legal protection for "hate speech"; the facilitation and creation of expressive opportunities (especially access to the media) for minorities; and the promotion of intercultural dialogue and understanding at the societal level.

This chapter scrutinizes the aforementioned strategies for tackling "hate speech," as well as the normative standards, jurisprudence, and monitoring practices on which they are based. It assesses their individual and collective impact and ultimately argues that the aggregated approach of the Council of Europe offers depth in its diversity and is conducive to proactive and effective engagement with several of the root causes of "hate speech."

Before commencing this examination, the scope of the term "hate speech" must be explored and its various possible meanings explained. The term first came to lexical prominence within the Council of Europe in 1997, when the Committee of Ministers adopted a Recommendation on the topic. The European Court of Human Rights first used the term – without attempting to define it or explaining its introduction – in 1999. Since then, the term has gained currency in relevant case law of the Court and miscellaneous activities across the Council of Europe. In the absence of any legally binding or otherwise authoritative definition of the term,[3] it is susceptible to interpretations which are either over- or underinclusive. "Hate speech" can refer to a whole spectrum of negative discourse stretching from incitement to hatred to abuse, vilification, insults, offensive words, epithets, and, arguably, to extreme examples of prejudice and bias.[4]

The problems arising from such definitional uncertainty can have far-reaching practical consequences. For instance, recommendations to blanket-ban "hate speech" are unhelpful (and often unworkable) because of their failure to recognize that "hate speech" is essentially a shorthand, catchall term for a range of specific types of expression, which vary in terms of their intensity and abusiveness. Although, intuitively, "hate speech" is "objectionable for both intrinsic and instrumental reasons, for what it is and what it does,"[5] the shift from its moral condemnation to legal regulation (or prohibition) inevitably calls for greater definitional refinement than has hitherto been provided by any international, legally binding treaty or related adjudicative authority. In other words, the scope of the term needs to be clarified and different kinds of "hate speech" need to be distinguished. This is because:

> The multiple forms of anti-egalitarian expression that exist are neither equally harmful nor performative, we must not, therefore, lose sight of the link between the norm that the state is drafting and the broader public policies involved when identifing [sic] the specific forms of anti-egalitarian expressions to discourage.[6]

This kind of thinking informs, and indeed characterizes, the Council of Europe's diversified strategies for countering "hate speech," as is demonstrated in this

[1] Statute of the Council of Europe, art 1(a), May 5, 1949, E.T.S. No 1 (as amended).

[2] *Id.*, art 1(b)

The author would like to thank the editors of this volume for their very helpful comments on a previous draft.

[3] The aforementioned Committee of Ministers' Recommendation on "hate speech" (discussed in detail later in the chapter) proposes a definition of the term for the purposes of the Recommendation, the definition is not legally binding on Member States of the Council of Europe.

[4] James B. Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* 11 (Oxford University Press 1998).

[5] Bhikhu Parekh, "Is There a Case for Banning Hate Speech?," Chapter 2 herein

[6] Jean-François Gaudreault-DesBiens, "From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide," 46 *McGill L J* 121, 133 (2000), *see also* Parekh, *supra* note 5.

Treaties	Articles
European Convention on Human Rights (ECHR)	10, 14, 17, Protocol 12
Framework Convention for the Protection of National Minorities (FCNM)	6, 9
European Convention on Transfrontier Television (ECTT)	7(1)
Additional Protocol to Convention on Cybercrime	esp. 1–6

FIGURE 24.1. Tabular summary of the Council of Europe's most relevant treaty provisions on "hate speech."

chapter. The chapter begins with the Council of Europe's most relevant treaties: the European Convention on Human Rights, the Framework Convention for the Protection of National Minorities, the Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, and the European Convention on Transfrontier Television (see Figure 24.1). It then turns to approaches which are not treaty-based, principally, standard-setting texts adopted by the Committee of Ministers and the Parliamentary Assembly – the Council's executive and deliberative organs, respectively. Part IV considers the monitoring and standard-setting work of the European Commission against Racism and Intolerance. Finally, Part V focuses on periodic, media-specific policy-making conferences at the inter-ministerial level, and pertinent legal analyses prepared by the Commission for Democracy through Law (Venice Commission) – the Council of Europe's advisory body on constitutional matters

II. TREATIES

A. *The European Convention on Human Rights*

1 Key Provisions of the Convention

The Council of Europe's flagship treaty and the centerpiece of human rights protection in Europe is the Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights, or ECHR.[7] The ECHR's key provision dealing with freedom of expression is Article 10.

1. Everyone has the right to freedom of expression This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Thus, Article 10(1) sets out the right to freedom of expression as a compound right comprising three main elements: the right to hold opinions; the right to receive information and ideas; and the right to impart information and ideas. Article 10(2) then proceeds to trammel the core right set out in the preceding paragraph, enumerating a number of grounds based on which the right may be restricted, provided that the restrictions are prescribed by law and are *necessary in a democratic society*. It justifies this approach by linking the permissibility of restricting the right to freedom of expression with the existence of duties and responsibilities that govern the right's exercise. The European Court of Human Rights has interpreted the criterion, "necessary in a democratic society," as "corresponding to a pressing social need."[8] Furthermore, any measure restricting the right to freedom of expression must also be proportionate to the legitimate aim pursued [9]

In addition, the right to freedom of expression may be limited on the basis of Article 17 of the ECHR [10] Entitled "Prohibition of abuse of rights," it reads

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention

Article 17 can be regarded as a safety mechanism designed to prevent the ECHR from being misused or abused by those whose intentions are contrary to the letter and spirit of the Convention.

2. Judgments and Decisions of the European Court of Human Rights

In its seminal 1976 ruling in *Handyside v. United Kingdom*,[11] a case involving restrictions on freedom of expression to protect morals,[12] the European Court of Human

[7] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4, 1950, 213 U.N.T.S. 221, E.T.S. No 5 Since 1989, membership in the Council of Europe has been contingent on being a Party to the ECHR. As of this writing, there are forty-seven States Parties to the ECHR For relevant details and analysis, see Florence Benoît-Rohmer and Heinrich Klebes, *Council of Europe Law. Towards a Pan-european Legal Area* 31–2 (Council of Europe Publishing 2005)

[8] *See, e.g.*, Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23, ¶ 48 (1976).

[9] *See, e.g., id.*, ¶ 49

[10] For general commentary, see David Harris et al., *Law of the European Convention on Human Rights* 648–52 (Oxford University Press, 2d ed. 2009).

[11] 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

[12] The case concerned the criminal conviction of the publisher of the *Little Red Schoolbook* and the seizure, forfeiture, and destruction of hundreds of copies of the book by the British authorities The

Rights affirmed that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society."[13] The *Handyside* judgment recognized that a democratic society must allow space for public discussion and debate. Since *Handyside*, the Court regularly has emphasized the importance of ensuring that individual and minority viewpoints are heard, so that public debate does not become the preserve of majoritarian, mainstream, and orthodox opinion.[14] This points to the need for public debate and the fora in which it is conducted to be designed in ways that facilitate the participation of diverse groups in society.[15] However, democratic society is not without its rough edges, and pluralistic public debate necessarily involves disagreement and confrontation between opposing viewpoints. Such disagreement and confrontation – even when expressed in strong terms (because Article 10 protects not only the substance of information and ideas, but also the form in which they are conveyed) – ordinarily come within the scope of the protection offered by Article 10.

The Court also has recognized the crucial role played by the media as facilitators of, and participants in, public debate. *Jersild v. Denmark* stands as a *locus classicus* for media freedom and it remains a central reference point for the Council of Europe's standard-setting activities concerning freedom of expression, the media, and "hate speech."[16] *Jersild* involved the conviction of a Danish journalist for aiding and abetting in the dissemination of racist statements in a televised interview he had conducted. The statements in question were uttered by members of an extreme right wing group known as the "Greenjackets," and the journalist was convicted largely because he had failed to contradict or distance himself from the statements

book was aimed at adolescents and contained extensive information about sex and sexuality. The measures against the publisher and book were taken pursuant to the Obscene Publications Act, in which the notion of a tendency "to deprave and corrupt" was central. In concluding that the authorities had not violated Article 10, the European Court of Human Rights placed considerable store by its "margin of appreciation" doctrine, according to which a certain amount of discretion is afforded states in how they regulate free expression. The extent of the discretion, which is subject to supervision by the Court, varies. States have a narrow margin of appreciation in respect of political speech and a wider one in respect of public morals (as in the present case), decency, and religion. This is usually explained (again, as in the present case) by the absence of a European consensus on whether or how matters such as morality should be regulated. *In casu*, the European Court of Human Rights found the English courts' decisions – taken "in the light of the case as a whole" – to be "relevant and sufficient" for the purposes of Article 10(2) of the ECHR.

13 *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 23, ¶ 49.

14 *See, e.g.*, Young, James & Webster v. United Kingdom, 44 Eur. Ct. H.R. (ser. A) at 25, ¶ 63 (1981); Chassagnou v. France, 1999-III Eur. Ct. H.R. 21, ¶ 112, Steel & Morris v. United Kingdom 2005-II Eur. Ct. H.R. 1, ¶ 89 (2005). For a case specifically concerning "hate speech" in which this principle was implicit, see Gündüz v. Turkey, discussed *infra* note 37.

15 *See, e.g.*, Appleby v. United Kingdom, 2003-VI Eur. Ct. H.R. 189.

16 Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) (1994).

of the interviewees. The Court held that Jersild's conviction was not "necessary in a democratic society" and that it therefore violated his rights under Article 10. This conclusion rested largely on considerations of context in (news) reporting and the importance of journalistic autonomy for the functioning of democracy. The European Court of Human Rights held that the journalist's right to freedom of expression had been infringed, *inter alia*, because it was not for the courts to determine which journalistic techniques (e.g., "the methods of objective and balanced reporting") should be used.[17]

The space and tolerance for robust debate recognized in *Handyside* and subsequent cases do not extend so far as to protect most types of "hate speech." The Court consistently has relied on Article 17 to deny Article 10 protection to racist, xenophobic, or anti-Semitic speech; statements denying, disputing, minimizing, or condoning the Holocaust; and neo-Nazi ideas. Such cases are routinely declared "inadmissible"; that is, the application seeking a finding that the ECHR has been violated is rejected.

For example, in *Seurot v. France*,[18] a teacher was sanctioned for a text published in a school bulletin in which he deplored – as he put it – the overrunning of France by "hordes of Muslims"[19] from North Africa. This was found not to violate his right to freedom of expression under Article 10 because of the undeniably racist tone of the article and the duties and responsibilities of the applicant in his capacity as a teacher.

In *Norwood v. United Kingdom*,[20] the applicant, a regional organizer for the British National Party (a far right political party), displayed in the window of his flat a poster depicting the Twin Towers in flames, the words "Islam out of Britain – Protect the British People," and a symbol of a crescent and star in a prohibition sign. He was convicted by the domestic courts of a public order offense. The European Court of Human Rights agreed with the assessment of the domestic courts and concluded that his conviction did not breach Article 10 because

> the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.[21]

In *Ivanov v. Russia*,[22] the applicant had written and published a series of articles that the European Court of Human Rights found to have a "markedly anti-Semitic

17 *Id.* at ¶ 31.

18 Seurot v. France (dec.), Eur. Ct. H.R. (Second Section) (May 18, 2004) No. 57383/00.

19 *Id.* at 2 (Author's translation, decision only available in French).

20 Norwood v. United Kingdom (dec.), 2004-XI Eur. Ct. H.R., No. 23131/03.

21 *Id.* at 4.

22 Ivanov v. Russia (dec.), Eur. Ct. H.R. (First Section) (February 20, 2007) No. 35222/04.

tenor "[23] It agreed "with the assessment made by the domestic courts that he sought through his publications to incite hatred towards the Jewish people."[24] Following *Norwood*, the Court found that "[s]uch a general and vehement attack on one ethnic group is in contradiction with the Convention's underlying values, notably tolerance, social peace and non-discrimination,"[25] and accordingly rejected the claim that penalizing this speech violated the ECHR.

The Court took its most trenchant stance against hate speech to date in the *Garaudy v. France* case,[26] which involved a challenge to the French courts' conviction of the applicant for the denial of crimes against humanity, the publication of racially defamatory statements, and incitement to racial hatred.[27] The European Court of Human Rights held:

> There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.
>
> The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace.[28]

A less clear-cut case, perhaps, as far as the boundaries of freedom of expression are concerned, was *Lehideux & Isorni v. France*.[29] The case concerned an advertisement

[23] *Id.* at 4.
[24] *Id.*
[25] *Id.*
[26] Garaudy v. France (dec.), Eur. Ct. H.R. (Fourth Section) (June 24, 2003) No. 65831/01. *See generally* Tarlach McGonagle, "Wresting (Racial) Equality from Tolerance of Hate Speech," 23 *Dublin Univ. L.J.* 21 (2001).
[27] Garaudy was convicted pursuant to the Press Freedom Act of 29 July 1881, as amended, *inter alia*, by the Act for the Suppression of All Racist, Anti-Semitic or Xenophobic Acts, No. 90–615 of 13 July 1990 (the so-called Gayssot Law). For details and analysis of relevant legislative provisions, see generally Julie C. Suk, "Denying Experience: Holocaust Denial and the Free-Speech Theory of the State," Chapter 8 herein.
[28] *Garaudy*, at 23 (official English translation).
[29] Lehideux & Isorni v. France, 1998-VII Eur. Ct. H.R. 2864. For further analysis of this case, see Toby Mendel, "Does International Law Provide for Consistent Rules on Hate Speech?," Chapter 22 herein.

in a national newspaper, *Le Monde*, which was part of a campaign for the rehabilitation of the memory of General Philippe Pétain. The advertisement presented the General's life in a selective and positive manner, with certain dark chapters of the General's life during World War II being conspicuous by the absence of any reference thereto. In this case, the European Court acknowledged that protection would be withheld from speech that it deemed contrary to the core values of the Convention,[30] but found that the impugned advertisement did not amount to Holocaust denial or any other type of expression that would deprive it of protection in accordance with Article 17. The Court readily acknowledged the polemical nature of the advertisement (*viz.*, a biased and consequently contested portrayal of a controversial national figure in the broader context of ongoing historical debate), but reiterated that Article 10 "protects not only the substance of the ideas and information expressed but also the form in which they are conveyed."[31]

Elements of Nazi ideology or activities inspired by Nazism have figured strongly in many inadmissibility decisions.[32] The extent to which Nazism is incompatible with the ECHR can be gauged from the oft-quoted pronouncement of the now-defunct European Commission of Human Rights[33] in *H., W., P. & K. v. Austria*: "National Socialism is a totalitarian doctrine incompatible with democracy and human rights and [that] its adherents undoubtedly pursue aims of the kind referred to in Article 17."[34]

The actual term "hate speech" does not appear in the ECHR, and it was not used by the Court (or the European Commission of Human Rights) until 1999.[35] Prior to that, the vocabulary was different, even if the targeted mischief was the same.[36] The Court has not yet defined the term and it sometimes places it in (scare)

[30] *Id.* at ¶ 53; *see also* Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) at ¶ 35 (1994).
[31] *Id.* at ¶¶ 52, 55.
[32] For a detailed overview of relevant ECHR case law, see McGonagle, *supra* note 26, Tarlach McGonagle, "Protection of Human Dignity, Distribution of Racist Content (Hate Speech)," in *Co-Regulation of the Media in Europe*, *IRIS Special* 43, 46 (Susanne Nikoltchev ed., European Audiovisual Observatory 2003).
[33] The European Commission of Human Rights was a body of independent experts charged with determining whether cases should be admitted for consideration on merits by the European Court of Human Rights. It was disbanded on November 1, 1998 upon entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which restructured the control machinery established by the Convention, E.T.S. No. 155, May 11, 1994. *See also id.* art. 5.
[34] H., W., P. & K. v. Austria (dec.), Eur. Comm'n H.R., No. 12774/87, 62 DR 216, 220–1 (1989).
[35] It would appear that the term was first used in four judgments of the European Court of Human Rights, all handed down on July 8, 1999: Sürek v. Turkey (No. 1), ¶ 62; Sürek & Ozdemir v. Turkey, ¶ 63, Sürek v. Turkey (No. 4), ¶ 60; and Erdogdu & Ince v. Turkey, ¶ 54.
[36] For details of relevant case law, see Anne Weber, *Manual on Hate Speech* (Council of Europe 2009); Anne Weber, "The case-law of the European Court of Human Rights on Article 10 ECHR relevant for combating racism and intolerance," in European Commission against Racism and Intolerance (ECRI), *Combating racism while respecting freedom of expression* (Council of Europe 2007); Mario Oetheimer, "Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law," 17 *Cardozo J. Int'l & Comp. L.* 427 (2009).

quotes.[37] This may indicate an unease with the *concept* of hate speech or perhaps the difficulty of defining the *term* in a clear way that would facilitate its application in case law. The difficulty of integrating the term, "hate speech," into a well-established body of jurisprudence based on recognized terminology has been apparent from the beginning. In *Sürek v. Turkey (No. 1)*, the Court reiterated that "the mere fact that 'information' or 'ideas' offend, shock or disturb does not suffice to justify" an interference with the right to freedom of expression, but then stipulated: "What is in issue in the instant case, however, is hate speech and the glorification of violence."[38] The significance of this stipulation is that the Court seems to be suggesting that "hate speech" is qualitatively different from speech that (merely) offends, shocks, or disturbs. To the extent the term is used to distinguish between categories of expression that enjoy presumptive protection under Article 10 and those that do not, the need to define it with precision becomes much more urgent. If a particular category of expression is to be denied Article 10 protection, it is of the utmost importance, not least from the perspective of legal certainty and foreseeability, that the Court would provide a clear sense of what the concept/category actually entails.

It should be noted that the Court does not use the term "hate speech" systematically. For instance, the term does not appear in *Norwood*, even though the type of expression at issue could be regarded as a typical example of "hate speech." Nor does the Court use the term consistently: It remains somewhat unclear whether incitement to violence or discrimination is an essential definitional element of the term. This uncertainty is prompted by the Court's judgment in *Gündüz v Turkey*. The case arose out of the participation of the applicant – the leader of an Islamic sect – in a live studio debate on topics such as women's clothing, Islam, secularism, and democracy. The applicant was convicted by the Turkish courts for incitement to hatred and hostility on the basis of a distinction founded on religion. However, the European Court of Human Rights held:

> Admittedly, there is no doubt that, like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. However, the Court considers that the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as "hate speech." Moreover, the applicant's case should be seen in a very particular context. Firstly, as has already been noted . . the aim of the programme in question was to present the sect of which the applicant was the leader; secondly, the applicant's extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.[39]

[37] See, e.g., Gündüz v. Turkey, Eur. Ct. H.R. (First Section) (December 4, 2003) at ¶ 51. The term "hate speech" is also enclosed by quotation marks in the Committee of Ministers' eponymously titled Recommendation No. R (97) 20, on which more below.

[38] *Surek v Turkey*, at ¶ 62.

Whereas the Court's use of the term "hate speech" is unclear, this is also true – at a more fundamental level – of its engagement of the interface between freedom of expression and various hues of racist and intolerant discourse. This is illustrated clearly by the controversial case of *Féret v. Belgium*.[40] The case arose from the conviction of a Belgian politician for incitement to hatred, discrimination, and violence due to the racist and xenophobic content of party political tracts distributed in the context of an electoral campaign. At the operative time, Daniel Féret was chairman of the far-right Belgian political party, Front National, editor-in-chief of the party's political publications, owner of the party's Web site (which was also used to distribute the impugned political tracts), and a member of the Belgian House of Representatives. To institute criminal proceedings against him, the Belgian prosecuting authorities lifted Féret's parliamentary immunity. He was ultimately found guilty of the aforementioned offenses and sentenced to 250 hours of community service relating to the integration of foreign nationals in Belgium, together with a 10-month suspended prison sentence. Furthermore, he was ruled ineligible to stand for parliamentary elections for a 10-year period and ordered to pay a provisional sum of 1 Euro to each of the civil parties involved.

The European Court of Human Rights found that the applicant's right to freedom of expression had not been violated, *inter alia*, because of the volatility of racist or xenophobic expression during electoral periods[41] and the duty of politicians "to refrain from using or advocating racial discrimination and recourse to words or attitudes which are vexatious or humiliating because such behavior risks fostering reactions among the public which are incompatible with a peaceful social climate and could erode confidence in democratic institutions."[42] In light of the civil nature of the sanctions and the suspended nature of the prison sentence, the Court found the sanctions not to be excessive.[43] The controversial nature of this judgment and the extent to which relevant questions persist can be gleaned from the Joint Dissenting Opinion to the judgment, which examines, *inter alia*, the relationship between heated political invective and racist expression, as well as the speculative nature of the link between the impugned expression and the harms it could cause.[44]

It is perhaps still too early to say what added value or clarity the introduction of the term "hate speech" has brought to the Court's jurisprudence relating to Articles 10 and 17 – at least in the absence of its own definition of the term. The Court

[39] *Gündüz v. Turkey*, at ¶ 51.

[40] Féret v Belgium, Eur. Ct. H.R. (Second Section) (July 16 2009).

[41] *Id.* at ¶ 76.

[42] *Id.* at ¶ 77 (author's translation).

[43] *Id.* at ¶ 80.

[44] *Id.* (Sajo, J. dissenting, joined by Zagrebelsky & Tsotsoria, JJ).

sometimes refers to the Council of Europe's Committee of Ministers' Recommendation (97) 20 on "Hate Speech," which describes the term (albeit for the purposes of the application of the principles set out in the Appendix to the Recommendation) as "covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."[45] This description is helpful, but only in a limited way, because (1) the Recommendation is not legally binding on states, and (2) it has yet to feature either frequently or prominently in relevant case law of the European Court of Human Rights, thereby denying it the extra legitimization that would accrue from the same.[46] Nevertheless, the gradual development and consolidation of relevant jurisprudence help further our understanding of the term, or at least of the Court's interpretation of the term.

"Hate speech" is not going to go away, so it is imperative that the Court prepare itself for protracted engagement with the underlying issues and – as long as it continues to use the term in a way relevant for interpretive purposes – also the meaning and scope of the term itself. This will require, first and foremost, considerable definitional dissection. The task will demand careful refinement of the Court's key principles and a more systematic approach to how it applies those principles to specific factual circumstances. The Court will have to examine, in the specifics of each case, whether sufficient consideration has been given to factors such as the intent of the speaker, "contextual variables,"[47] and the demonstrably harmful impact of the impugned expression. Ascertainment of the intent or motivation of a speaker can reveal whether the impugned expression has been fueled by animus. Contextual variables could include the nature and impact of the medium used to convey the expression, audience-related considerations, sociopolitical factors, the nature and severity of the sanction imposed, and so on. The requirement of a demonstrably harmful impact insists on the establishment of a clear causal connection between the impugned expression and the alleged resultant harm to others.[48] To date, the Court's reliance on Article 17 to deny protection to certain broad categories of

[45] Council of Eur., Comm. of Ministers, Recommendation No. R (97) 20 to Member States on "Hate Speech," 607th meeting (Oct. 30, 1997), Appendix, *available at* http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(1997)020&ExpMem_en.asp#TopOfPage

[46] Gündüz v. Turkey, Eur. Ct. H.R. (First Section) (December 4, 2003), is an example of a case in which the Recommendation was referred to by the Court (see ¶ 21 and especially ¶ 22 of the judgment) under the heading "Relevant international instruments." However, its subsequent engagement with the Recommendation is indirect – it merely refers to the aforementioned relevant international instruments *en bloc*. *Id.* at ¶ 40. In *Féret*, however, the Court's engagement with relevant Committee of Ministers' Recommendations and relevant work by ECRI is more explicit. *See Féret* at ¶ 72.

[47] Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," Chapter 13 herein.

[48] For further discussion on the question of causality and the prevention of harm in free speech theory, see Frederick Schauer, "Is It Better to Be Safe Than Sorry? Free Speech and the Precautionary Principle," 36 *Pepp. L. Rev.* 301 (2009).

expression has been routine and, on occasion, reflexive. The need for clarification of the relationship between Articles 10 and 17 is becoming increasingly urgent, as illustrated by a couple of recent cases involving political expression with a racist or intolerant character.[49]

B. *Framework Convention for the Protection of National Minorities*

The 1995 Framework Convention for the Protection of National Minorities (FCNM)[50] sets out a range of rights to be enjoyed by persons belonging to national minorities, including:

- equality and nondiscrimination (Article 4)
- culture, identity, and nonassimilation (Article 5)
- freedom of religion or belief (Article 8)
- freedom of expression (Article 9)
- use of own language in public and in private and (in certain circumstances) in dealings with administrative authorities (Article 10)
- use of names (personal and geographical) in own language (Article 11)
- education (Articles 12 and 13)
- language learning (Article 14)
- effective participation in cultural, social, and economic life and in public affairs (Article 15).

As its title indicates, the FCNM is a *framework* convention. Accordingly, States Parties have some leeway in the honoring of their commitments under the Convention. States may implement the programmatic provisions of the Convention in such a way as to reflect relevant *couleur locale*. The rights that the FCNM purports to safeguard are not justiciable under the treaty itself. Rather, the implementation of the FCNM at the national level is assessed in the context of a system of state reporting. Ultimate control and responsibility for monitoring the implementation of the FCNM rests with the Committee of Ministers of the Council of Europe and an Advisory Committee (AC) that assists it in this regard. The AC does the lion's share of the work, even though its role is formally described as one of "assistance."[51]

[49] Féret v. Belgium and Le Pen v. France, (dec.), Eur. Ct. H.R. (Fifth Section) (Apr. 20 2010), App. No. 18788/09.

[50] E.T.S. No. 157 (entered into force Feb. 1, 1998). As of this writing, thirty-nine Council of Europe Member States have ratified (or otherwise acceded to) the FCNM.

[51] The Advisory Committee currently comprises eighteen independent experts, who are appointed by the Committee of Ministers for periods of four years. Members of the Advisory Committee must have "recognised expertise in the field of the protection of national minorities." Members are required to serve in their individual capacities and discharge their functions in an independent, impartial, and efficient manner. *See also* Resolution (97)10, Rules adopted by the Committee of Ministers on the monitoring arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities (Sep. 17, 1997).

The FCNM regards the creation of expressive and dialogical opportunities as being of crucial importance for safeguarding pluralism and tolerance in a democratic society. Its most important provisions in this respect are Articles 6 and 9. The former reads:

1. The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.
2. The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

Article 9 of the FCNM, for its part, expands slightly on the scope of Article 10, ECHR (on which it was modeled):

1. The Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media
2 Paragraph 1 shall not prevent Parties from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises.
3. The Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities In the legal framework of sound radio and television broadcasting, they shall ensure, as far as possible, and taking into account the provisions of paragraph 1, that persons belonging to national minorities are granted the possibility of creating and using their own media
4 In the framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism.

The FCNM's strategies for countering "hate speech" stem from the synergistic interaction of these two articles. They seek to address the problem of "hate speech" before it actually spawns, by emphasizing the need to foster, including via the media, improved interethnic and intercultural understanding and tolerance through the development of dialogical relationships between communities. These strategies are informed by recognition that the media are capable of contributing to the promotion

of tolerance and intercultural understanding, as well as to the elimination of negative stereotyping and negative portrayal of minorities

Communicative engagement is essential to building intergroup awareness and understanding This implies a need to share information and perspectives. Opportunities for self definition and public representation are crucial for minorities, especially given the corrective potential of such opportunities vis-à-vis dominant or prevalent societal attitudes regarding them. The transmission of minority-centered programs can expose wider *tranches* of society to minority perspectives and cultures, thereby raising the profile of minority cultures and their prestige outside of minority groups themselves. The nature and extent of media coverage are related to, but also logically prior to, the problem of negative reporting on, and stereotyping of, minorities. These arguments, which inform Article 9(4), are important for the transmission and legitimization of minority cultures. The FCNM displays a conviction that "more speech" can be an effective, preemptive strategy against hate speech.[52] And the approach goes beyond traditional counterspeech, which is responsive and corrective; "more speech" can also be anticipatory and preemptive.

The AC has proposed various responses to the problem of negative reporting, many of which center on the promotion of balanced and accurate reporting[53] and adherence to journalistic codes of ethics and standards, among other things.[54] The AC has consistently emphasized the importance of special training and programs for journalists on minority issues.[55] The goal is to familiarize journalists with minority issues and sensitivities likely to arise in the course of their coverage of those issues. Exchange programs for journalists have also been considered, with the same goals in mind.[56] Related strategies include the establishment of ethnically diverse training courses in journalism,[57] with a view to increasing the number of persons from

[52] *See also* Katharine Gelber, *Speaking Back The Free Speech Versus Hate Speech Debate* (John Benjamins Publishing 2002); Katharine Gelber, "Reconceptualizing Counterspeech in Hate-Speech Policy (with a Focus on Australia)," Chapter 11 herein.

[53] *See, e g* , AC's Opinion on Slovakia (Sep 22, 2000) (Section "In respect of Article 6"), *available at* http //www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_SlovakRepublic en.pdf.

[54] Of particular importance in this connection is the practice of only mentioning the ethnic origin of sub ects of reporting when strictly relevant. *See, e g.*, AC's Opinion on the United Kingdom (Nov 30, 2001), ¶ 53, *available at* http //www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_UK_en pdf.

[55] *See, e.g.*, AC's Opinions on Albania (Sep. 12, 2002), ¶ 98, *available at* http //www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st OP_Albania_en.pdf; Lithuania (Feb. 21, 2003), ¶ 45, *available at* http //www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_Lithuania_en pdf; Spain (Nov 27, 2003), ¶ 63, *available at* http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_Spain_en.pdf; Sweden (Feb 20, 2003), ¶¶ 34, 78, *available at* http //www coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st OP Sweden_en pdf; Ukraine (March 1, 2002), ¶ 39, *available at* http://www coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_Ukraine_en pdf

[56] AC's Opinion on Slovakia, *supra* note 53.

[57] AC's Second Opinion on Denmark (Dec. 9, 2004), ¶ 95, *available at* http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_Denmark_en pdf

different ethnic, religious, and other groups entering the media sector in professional capacities.[58] These emphases form a rather comprehensive approach to countering negative reporting.[59]

The AC often calls for vigilance by state authorities toward negative reporting as a countermeasure to the same. However, those calls are accompanied by standard reminders of the need to show deference to the principle of (editorial) independence of the media, and also, on occasion, by reminders of the need to observe overarching principles of freedom of expression as well.[60]

C. *Additional Protocol to the Convention on Cybercrime*

The 2001 Convention on Cybercrime[61] sought to pursue a common policy to protect society against cybercrime. After critics argued that it failed to address racism and xenophobia,[62] it was supplemented in 2003 by an Additional Protocol "concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems."[63] The central aims of the Additional Protocol are to harmonize "substantive criminal law in the fight against racism and xenophobia on the Internet," and to improve "international co-operation in this area."[64]

Article 3 of the Additional Protocol requires states to "adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: distributing, or otherwise making available, racist and xenophobic material to the public through a computer system."[65] "Racist and xenophobic material" is defined as

[58] *Id* at ¶ 103

[59] AC's Opinion on the Russian Federation (Sep. 13, 2002), ¶ 135, *available at* http //www coe int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_1st_OP_RussianFederation_en.pdf.

[60] AC's Second Opinion on Italy (Feb. 24, 2005), ¶ 82, *available at* http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_2nd_OP_Italy_en.pdf.

[61] E.T.S No 185, entered into force July 1, 2004 As of this writing, the Convention has been ratified (or otherwise acceded to) by thirty Council of Europe Member States and one non-Member State (the United States)

[62] *See, e.g.*, the following Parliamentary Assembly of the Council of Europe texts Opinion No 226 (2001), "Draft convention on cybercrime" (Apr 24, 2001); Recommendation 1543 (2001), "Racism and xenophobia in cyberspace" (Nov 8, 2001), Opinion No 240 (2002), "Draft additional protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems" (Sep 27, 2002).

[63] E.T.S. No 189, entered into force March 1, 2006 [hereinafter *Cybercrime Additional Protocol*]. As of this writing, the Additional Protocol has been ratified or otherwise acceded to by eighteen Council of Europe Member States and no non-Member States. *See also* Explanatory Report to the Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist or xenophobic nature committed through computer systems (Nov 7, 2002), ¶ 9 [hereinafter *Cybercrime Explanatory Report*].

[64] *Id*, ¶ 3

[65] *Cybercrime Additional Protocol*, *supra* note 63, art. 3(1).

> any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.[66]

The breadth of Article 3 is largely determined by three main qualifications First, and of central importance, is the requirement that intent or *mens rea* be present for activity to be criminal. A corollary of this requirement is that an Internet Service Provider (ISP) is not liable for the dissemination of material where it has acted merely as conduit, cache, or host for such material.[67]

Second, offenses must be committed "without right" a term that recurs in other provisions of the Additional Protocol. The Additional Protocol's Explanatory Report makes a not entirely satisfying attempt to clarify the meaning of this term, stating that conduct taken "without right" can refer to "conduct undertaken without authority (whether legislative, executive, administrative, judicial, contractual or consensual)" or to "conduct that is otherwise not covered by established legal defences, excuses, justifications or relevant principles under domestic law."[68]

Third, Article 3(2) allows states not to criminalize relevant acts if the material "advocates, promotes or incites discrimination that is not associated with hatred or violence, *provided that other effective remedies are available*."[69] Such remedies would typically be of a "civil or administrative" nature [70] This could be taken as an important endorsement of the efficacy and value of, for example, self- and co-regulatory complaints and sanctioning mechanisms. Nevertheless, neither the Additional Protocol nor its Explanatory Report explores the range of potentially effective remedies.

Whereas Article 3 concerns mere dissemination of racist material, Article 4 addresses actual threats. It requires States Parties to criminalize the following conduct when it is committed "intentionally and without right":

> threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics.[71]

[66] *See also Cybercrime Explanatory Report*, *supra* note 63, at ¶¶ 10–22.

[67] *Id.*, ¶ 25 Similarly, Article 7 shields ISPs from aiding and abetting liability in the outlined circumstances *Id*, ¶ 45

[68] *Id.*, ¶ 24.

[69] *Cybercrime Additional Protocol*, *supra* note 63, art 3(2) (emphasis added) "Violence" refers to "the unlawful use of force" and "hatred" to "intense dislike or enmity." *Cybercrime Explanatory Report*, *supra* note 63, ¶ 15 The definitional approach to the notion of discrimination is *broadly* congruent with the approach taken by the European Court of Human Rights in respect of the European Convention on Human Rights. For further details and nuances, see *id*, ¶¶ 16–21. However, no interpretive guidance is given on what *association* with hatred or violence could concretely entail.

[70] *Id.*, ¶ 32.

[71] *Cybercrime Additional Protocol*, *supra* note 63, art. 4.

This spans both public and private communications, unlike the target of the similarly worded Article 5 ("Racist and xenophobic motivated insult"), which is only concerned with public communications. Article 5 requires states to criminalize "insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics."[72] A requirement for states to criminalize racial insults could seems in real tension with relevant case law of the European Court of Human Rights. At first glance, the threshold for "insult" could appear rather low and thus potentially open to abuse. The Explanatory Report to the Additional Protocol states that the "notion of 'insult'" refers to "any offensive, contemptuous or invective expression which prejudices the honour or the dignity of a person," where it is clear that "the insult is directly connected with the insulted person's belonging to the group."[73] Yet, under the seminal principle laid down in *Handyside* (and consistently followed by the Court ever since), freedom of expression extends "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population "[74] In specific cases, the intensity of the "insult" is necessarily determinative, but the presence of the racist element is clearly transformative· Racist insults are regarded as being qualitatively different to insults without a racist character.

Finally, Article 6 of the Additional Protocol ("Denial, gross minimisation, approval or justification of genocide or crimes against humanity") is a first in international human rights law in that it applies the offense of genocide denial to genocides other than the Holocaust. Article 6 reads:

1. Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right.

distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party

[72] *Id.*, art. 5.
[73] *Cybercrime Explanatory Report*, *supra* note 63, ¶ 36
[74] Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23, ¶ 49 (1976)

2. A Party may either
   (a) require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise
   (b) reserve the right not to apply, in whole or in part, paragraph 1 of this article.[75]

This provision was drafted in response to a growing incidence of court cases at the national level concerning the denial or minimization of genocide or crimes against humanity (especially the Holocaust) and an awareness of the underlying racist or xenophobic motivation for such denial or minimization and its potentially nefarious impact on racist and xenophobic groups.[76] The inclusion of genocides other than the Holocaust was prompted by the realization that more recent genocides and crimes against humanity have been recognized by international courts and tribunals since the Nuremburg Tribunal and that others may be recognized in the future [77] The Explanatory Report to the Additional Protocol links Article 6 to the conclusion of the European Court of Human Rights in the *Lehideux & Isorni* case, that the "negation or revision" of "clearly established historical facts – such as the Holocaust . would be removed from the protection of Article 10 by Article 17 [ECHR]."[78]

D. *European Convention on Transfrontier Television*

The 1989 European Convention on Transfrontier Television (ECTT) sets out to "facilitate, among the Parties, the transfrontier transmission and the retransmission of television programme services "[79] Article 7(1) is entitled "Responsibilities of the broadcaster." Its *chapeau* paragraph insists that broadcast material must, in its presentation and content, "respect the dignity of the human being and the fundamental rights of others." The provision explicitly applies to "all items of programme services" – that is, "programmes, advertising, programmes trailers, public

[75] The Explanatory Report clarifies that art 6(2)(a) can be achieved by a Party entering a declaration to the Protocol, and that art 6(2)(b) can be achieved by a Party entering a reservation to the Protocol. *Cybercrime Explanatory Report*, *supra* note 63, ¶ 43
[76] *Id.*, ¶ 39
[77] *Id.*, ¶ 40 *See generally* Irwin Cotler, "State-Sanctioned Incitement to Genocide: The Responsibility to Prevent," Chapter 23 herein.
[78] *Cybercrime Explanatory Report*, *supra* note 63, ¶ 42, citing Lehideux & Isorni v. France, 1998-VII Eur. Ct. H.R. 2864, ¶ 47.
[79] E.T.S. No. 132 (entered into force May 1, 1993), as amended by a Protocol thereto, E.T.S. No. 171, (entered into force March 1, 2002), art. 1. As of this writing, thirty Member States of the Council of Europe have ratified (or otherwise acceded to) the ECTT, as well as one non-Member State (The Holy See)

announcements" and other such elements.[80] Article 7(1)(b) further states that programs shall not "give undue prominence to violence or be likely to incite to racial hatred." A Party shall communicate an alleged violation of the ECTT in the first instance to the transmitting Party. "If the alleged violation is of a manifest, serious and grave nature which raises important public issues" and concerns, *inter alia*, Article 7(1) and "if it persists within two weeks following the communication, the receiving Party may suspend provisionally the retransmission of the incriminated programme service."[81]

III. REGULATION OF "HATE SPEECH" OUTSIDE THE TREATY FRAMEWORK

The Council of Europe engages in a wide range of standard-setting activities not based on specific treaties. An important preliminary caveat is in order. The standard-setting texts adopted by the Council of Europe's Committee of Ministers, Parliamentary Assembly, and European Commission against Racism and Intolerance may be politically persuasive, but they are not legally binding on Member States. They generally serve to indicate either the normative status quo in relation to their subject matter or the direction in which the body in question would like future law and policy to develop. Nevertheless, awareness of these standard-setting texts is growing and, as a result, so too is their impact. For instance, the European Court of Human Rights refers increasingly to the Committee of Ministers' Recommendation on "Hate Speech" (see below) in its judgments.[82]

A. *Committee of Ministers*

The Committee of Ministers is the executive organ of the Council of Europe. It is empowered to issue, *inter alia*, Recommendations to Member States of the Council of Europe and general Declarations.[83] As their names suggest, Recommendations advocate particular courses of action, whereas Declarations are declaratory of particular (legal) situations or themes.

1. Resolution 68(30)

An early example of the Committee of Ministers' engagement with what could be classified as "hate speech" is its Resolution 68(30), entitled "Measures to be taken against incitement to racial, national and religious hatred."[84] Its primary aim is to press Member States of the Council of Europe to sign, ratify, and subsequently give domestic legal effect to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[85] It asks governments to "review their legislation in order to ensure that it provides for effective measures on the matter of prohibition of racial discrimination as well as on the related question of the elimination of all forms of intolerance and discrimination based on religion or belief."

[80] Explanatory Report to the European Convention on Transfrontier Television, as amended, ¶ 155, *available at* http://conventions.coe.int/treaty/en/Reports/Html/132.htm.

[81] E.T.S. No. 132, art. 24.

[82] It usually does so in the recurrent section, "Relevant International Instruments." *See, e.g.*, Féret v. Belgium, Eur. Ct. H.R. (Second Section) (July 16, 2009) ¶¶ 44, 72; Gündüz v. Turkey, Eur. Ct. H.R. (First Section) (December 4, 2003) ¶ 22.

[83] Prior to 1979, Recommendations to Member States were known as Resolutions.

2. Recommendation 97(20)

The Committee of Ministers' most extensive engagement with "hate speech" came in 1997, with the adoption of Recommendations on "hate speech"[86] and on the media and the promotion of a culture of tolerance.[87]

The recommendation on "hate speech," number 97(20), defines "hate speech" to cover

> all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.[88]

It is clear from the Preamble to the Recommendation that it is anchored in the prevailing standards of international law as regards both freedom of expression and antiracism. It acknowledges the need to grapple with "all forms of expression which incite to racial hatred, xenophobia, antisemitism and all forms of intolerance, since they undermine democratic security, cultural cohesion and pluralism." It also recognizes and draws attention to a number of the central paradoxes involved, for example, that the dissemination of such forms of expression via the media can lead to their having "a greater and more damaging impact," but that there is nevertheless

[84] Adopted by the Ministers' Deputies on October 31, 1968.

[85] *Id.*, ¶ A.1.

[86] Council of Eur., Comm. of Ministers, Recommendation No. R (97)20 to Member States on "Hate Speech," 607th meeting (Oct. 30, 1997).

[87] Council of Eur., Comm. of Ministers, Recommendation No. R (97)21 to Member States on the Media and the Promotion of a Culture of Tolerance, 607th meeting (Oct. 30, 1997).

[88] Recommendation No. R (97)20, *supra* note 86. The drafting process of the Recommendations can be traced to the Summit of Heads of State and Government of the Council of Europe Member States held in Vienna in 1993. The Summit concluded with the adoption of, *inter alia*, a Declaration and Action Plan on combating racism, xenophobia, anti-Semitism, and intolerance. That Declaration set out the parameters for the work that was to follow. This is the formal explanation for why the resulting Recommendation (97)20 on "hate speech" does not cover all forms of intolerance (e.g., "intolerance on grounds of sex, sexual orientation, age, handicap, etc."). Explanatory Memorandum to Recommendation No. R (97)20 on "Hate Speech," ¶ 22, *available at* http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%281997%29020&expmem_EN.asp.

a need to "respect fully the editorial independence and autonomy of the media." These are circles that are not easily squared in the abstract, hence the aim of the Recommendation to provide "elements" of guidance for application in specific cases.

The operative part of the Recommendation calls on national governments to take appropriate steps to implement the principles annexed to the Recommendation; "ensure that such steps form part of a comprehensive approach to the phenomenon, which also targets its social, economic, political, cultural and other root causes"; where states have not already done so, "sign, ratify and effectively implement" ICERD in their domestic legal orders; and "review their domestic legislation and practice in order to ensure that they comply with the principles" appended to the Recommendation.[89]

The principles in question address a wide range of issues. Principle 1 points out that public officials are under a special responsibility to refrain from making statements – particularly to the media – that could be understood as, or have the effect of, hate speech. Furthermore, it calls for such statements to be "prohibited and publicly disavowed whenever they occur." According to Principle 2, states' authorities should "establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or rights of others." It suggests detailed ways and means of achieving such ends. Principle 3 stresses that states' authorities should ensure that within their legal frameworks, "interferences with freedom of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria."

Principle 4 affirms that some particularly virulent strains of hate speech might not warrant any protection whatsoever under Article 10, ECHR. This is a reference to the import of Article 17, ECHR, and to existing case law on the interaction of Articles 10 and 17. Principle 5 highlights the need for a guarantee of proportionality whenever criminal sanctions are imposed on persons convicted of hate speech offenses.

Whereas the Recommendation as a whole is redolent of the *Jersild* case generally,[90] Principle 6 specifically harks back to one of the Court's key findings in the case: It calls for national law and practice to distinguish "between the responsibility of the author of expressions of hate speech on the one hand and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand." The reasoning behind this Principle is that "it would unduly hamper the role of the media if the mere fact that they assisted in the dissemination of the statements engaged their legal responsibility or that of the media professional

[89] Recommendation No. R (97)20, *supra* note 86

[90] *See* Explanatory Memorandum to the Recommendation, *supra* note 88, ¶¶ 19, 30, 38, 46 *et seq*

concerned."[91] Principle 7 develops this reasoning by stating that national law and practice should take into account that:

- reporting on racism, xenophobia, anti-Semitism, or other forms of intolerance is fully protected by Article 10(1), ECHR, and may only be restricted in accordance with Article 10(2), ECHR;
- when examining the necessity of restrictions on freedom of expression, national authorities must have proper regard for relevant case law of the European Court of Human Rights, including the consideration afforded therein to 'the manner, contents, context and purpose of the reporting," and
- "respect for journalistic freedoms also implies that it is not for the courts or the public authorities to impose their views on the media as to the types of reporting techniques to be adopted by journalists."[92]

3. Recommendation 97(21)

Whereas combating hate speech may be considered a defensive or reactive battle, the promotion of tolerance – an objective to which it is intimately linked – is more proactive.[93] Recommendation (97)21 on the Media and the Promotion of a Culture of Tolerance was conceived of as the logical complement to the Recommendation on "Hate Speech." The main justification for preparing a separate Recommendation dealing with the positive contribution which the media can make to countering hate speech was:

> As concerns the propagation of racism and intolerance there is, in principle, scope for imposing legally binding standards without violating freedom of expression and the principle of editorial independence. However, as concerns the promotion of a positive contribution by the media, great care needs to be taken so as not to interfere with these principles. This area calls for measures of encouragement rather than legal measures.[94]

The Recommendation urges Member States to raise awareness of the media practices they promote in all sections of the media and to remain open to supporting initiatives that would further the objectives of the Recommendation. It is suggested that initial and further training programs could do more to sensitize (future) media professionals to issues of multiculturalism, tolerance, and intolerance. Reflection on such issues is called for among the general public, but crucially also within media enterprises

[91] *Id.*, ¶ 38.

[92] Recommendation No. R (97)20, *supra* note 86, appendix, Principle 7

[93] It should also be mentioned that the European Commission against Racism and Intolerance frequently refers to the need to assure minority groups effective access to the media, *inter alia*, to counter negative stereotypes of their cultures and lifestyles, and more generally to promote intercommunity understanding and tolerance.

[94] Explanatory Memorandum to Recommendation No. R (97)20, *supra* note 88, ¶ 12.

themselves. It is also pointed out that it would be desirable for representative bodies of media professionals to undertake "action programmes or practical initiatives for the promotion of a culture of tolerance," and that such measures viably could be complemented by codes of conduct.

Broadcasters, especially those with public-service mandates, are encouraged to "make adequate provision for programme services, also at popular viewing times, which help promote the integration of all individuals, groups and communities as well as proportionate amounts of airtime for the various ethnic, religious and other communities." They also are encouraged to promote the values of multiculturalism in their programming, especially in their program offerings targeting children. Finally, the Recommendation mentions the benefits of codes of conduct in the advertising sector, which prohibit discrimination and negative stereotyping. It also flags the usefulness of advertising campaigns promoting tolerance.

Together, the twin Recommendations on "hate speech" and on the media and the promotion of a culture of tolerance serve as an influential reference point among standard-setting texts adopted by the Committee of Ministers. They are frequently invoked in other Recommendations and Declarations. For instance, they – or their underlying principles, such as the protection of human dignity – have informed the Committee of Ministers' approaches to freedom of political debate, the fight against terrorism, the promotion of intercultural dialogue, the safeguarding of human rights in a digital environment, and the protection of minors, especially in an online context. These topics will now be summarily dealt with in turn.

4. Declaration on Freedom of Political Debate

The central aims of the 2004 Declaration on Freedom of Political Debate in the Media[95] were to "send a strong political signal to condemn" practices such as the persecution of journalists because of their criticism of politicians or public authorities and to "reaffirm the Council of Europe's attachment to the fundamental value of free political debate."[96] The Preamble to the Declaration recalls the Recommendation on "Hate Speech" and emphasizes "that freedom of political debate does not include freedom to express racist opinions or opinions which are an incitement to hatred, xenophobia, antisemitism and all forms of intolerance." The substantive part of

[95] Council of Eur., Comm. of Ministers, Declaration on Freedom of Political Debate in the Media, 872d Mtg (Feb. 12, 2004) [hereinafter Declaration on Freedom of Political Debate].

[96] Páll Thórhallsson, "Freedom of Political Debate and the Council of Europe," in *IRIS Special. Political Debate and the Role of the Media – The Fragility of Free Speech* 53 (Susanne Nikoltchev ed., European Audiovisual Observatory 2006). Thórhallsson explains that the decision to issue a Declaration on this topic was taken as early as 1998 when it emerged from monitoring exercises within the Council of Europe that journalists were being persecuted for political criticism in many Member States. *Id.*

the Declaration – under the heading "Remedies against violations by the media" – states:

> Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech [97]

As such, the Declaration reiterates that racist expressions amounting to incitement to specific types of hatred are beyond the pale of protection offered by Article 10, ECHR. This is an accurate representation of the case law surrounding Article 10. However, the implication of the quoted sentence is that hate speech is always an example of the most serious sort of defamation or insult, and thus one for which imprisonment is always an appropriate sanction. Given the severity and chilling effect of imprisonment as a sanction, and given also the potentially wide definitional embrace of the term "hate speech," it would have been both more accurate and more strategically sound to have referred to only the most serious or invidious types of "hate speech."

5. The Fight Against Terrorism

The 2005 Declaration on Freedom of Expression and Information in the Media in the Context of the Fight Against Terrorism[98] "invites" media professionals "to consider" suggestions such as:

- to bear in mind the significant role that they can play in preventing "hate speech" and incitement to violence, as well as in promoting mutual understanding;
- to be aware of the risk the media and journalists can unintentionally serve as a vehicle for the expression of racist or xenophobic feelings or hatred;
- to bear in mind the importance of distinguishing between suspected or convicted terrorists and the group (national, ethnic, religious, or ideological) to which they belong or to which they claim to subscribe; and
- to set up training courses, in collaboration with their professional organizations, for journalists and other media professionals who report on terrorism, on their safety and the historical, cultural, religious, and geopolitical context of the scenes they cover, and to invite journalists to follow these courses.

The perennial question of how to devise effective and appropriate counterterrorism strategies is highly sensitive, which increases the risk of emotionally laden

[97] Declaration on Freedom of Political Debate, *supra* note 95, art. 8.

[98] Council of Eur. Comm. of Ministers, Declaration on Freedom of Expression and Information in the Media in the Context of the Fight Against Terrorism, 917d Mtg (March 2, 2005).

political debate and general media coverage. Hence the importance of specific provisions aiming to ensure that the depiction of certain groups remain within the bounds of the temperate Responsible, value-sensitive journalism is the lodestar here, but the Declaration favors a noncoercive approach toward the media, thereby respecting the principle of media autonomy. The Declaration's promotion of responsible journalism concerns professional practice and training programs: This is evidence of a simultaneous commitment to the immediate and longer-term goals of countering "hate speech."

6. Promotion of Intercultural Dialogue

Without explicitly mentioning "hate speech," a number of recent texts adopted by the Committee of Ministers seek to promote intercultural communication and thereby pursue an aim that can prove effective in preempting "hate speech." The Committee of Ministers' 2007 Recommendation on media pluralism and diversity of media content, for instance, recognizes the "crucial contribution of the media in fostering public debate, political pluralism and awareness of diverse opinions, notably by providing different groups in society – including cultural, linguistic, ethnic, religious or other minorities – with an opportunity to receive and impart information, to express themselves and to exchange ideas."[99] It notes the capacity of community, local, minority, and social media to provide "a space for dialogue."[100] It further recommends that Member States "encourage the media to contribute to intercultural and inter-religious dialogue, so as to promote mutual respect and tolerance and to prevent potential conflicts through discussions."[101]

The Committee of Ministers' Recommendation on the Remit of Public Service Media in the Information Society articulates a number of insightful reflections on the goal of public service media to be inclusive vis-à-vis all groups in society and to therefore ensure that their services and structures are appropriately accessible to all.[102] Similar reflections about the suitability and diversity of public service media content are also provided.[103] Importantly for the present analysis, the Recommendation states that public service media should harness new digital and online technologies to "actively promote a culture of tolerance and mutual understanding."[104]

[99] Council of Eur., Committee of Ministers, Recommendation (2007)2 to Member States on Media Pluralism and Diversity of Media Content, 985th meeting (Jan 31, 2007), Preamble, *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1089699.

[100] *Id.*, § I, ¶ 4

[101] *Id.*, § II, ¶ 2.2. To achieve this aim, it suggests promoting minority participation in organizational structures and to exploit the potential of digital media literacy for bridging the digital divide.

[102] Council of Eur., Comm. of Ministers, Recommendation (2007)3 to Member States on the Remit of Public Service Media in the Information Society, 985th meeting (Jan. 31, 2007), ¶¶ 8–10, *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1089759

[103] *Id.*, ¶¶ 23–24

[104] *Id.*, ¶ 16

The Committee of Ministers' Declaration on the role of community media in promoting social cohesion and intercultural dialogue recognizes community media as a distinct media sector and proposes various regulatory, technical, and capacity-building measures to promote its further development.[105] The Declaration explicitly acknowledges the "important role" that community media can play in "promoting social cohesion, intercultural dialogue and tolerance." More specifically, it recognizes

> the contribution of community media in fostering public debate, political pluralism and awareness of diverse opinions, notably by providing various groups in society – including cultural, linguistic, ethnic, religious or other minorities – with an opportunity to receive and impart information, to express themselves and to exchange ideas.[106]

7. Safeguarding Human Rights in a Digital Environment

Two of the foundational premises of the Committee of Ministers' approach to human rights questions in a digital environment are: (1) all human rights and "essential public interest objectives" should be afforded the same level of protection as in the off line world;[107] and (2) a willingness to explore new regulatory models (i.e., including self- and co-regulatory models), technical standards and systems, codes of ethics and conduct, and other measures is key to safeguarding human rights and public interests.[108] Freedom of expression and information, the protection of human dignity, and protection from racial and other forms of discrimination are recurrently mentioned as meriting priority attention in this connection.[109]

These premises are set out in some detail in the Committee of Ministers' Declaration on Human Rights and the Rule of Law in the Information Society (2005).[110]

[105] Council of Eur., Comm. of Ministers, Declaration on the Role of Community Media in Promoting Social Cohesion and Intercultural Dialogue, 1048th meeting (Feb 11, 2009), *available at* http://www.commedia.org.uk/wp-content/uploads/2009/02/declaration-community-media-adopted-11-02-09.pdf.

[106] *Id.*, Preamble

[107] Council of Eur., Comm. of Ministers, Recommendation (2003)9 to Member States on Measures to Promote the Democratic and Social Contribution of Digital Broadcasting, 840th meeting (May 28, 2003), *available at* http://www.ebu.ch/CMSimages/en/leg_ref_coe_12003_9_digital_broadcasting_280503_tcm6-5032.pdf

[108] Council of Eur., Comm. of Ministers, Declaration on a European Policy for New Information Technologies, 104th Sess. (May 7, 1999), § (v), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=448133 ("With respect to Protection of rights and freedoms").

[109] *See, e.g.*, Council of Eur., Comm. of Ministers, Recommendation (2007)11 to Member States on Promoting Freedom of Expression and Information in the New Information and Communications Environment, 1005th meeting (Sept. 26, 2007), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1188541; Council of Eur., Comm. of Ministers, Declaration on Freedom of Communication on the Internet, 840th meeting (May 28, 2003), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=37031.

[110] Council of Eur., Comm. of Ministers, Declaration on Human Rights and the Rule of Law in the Information Society, 926th Meeting (May 13, 2005), *available at* https://wcd.coe.int/wcd/ViewDoc

The first section of the Declaration is entitled "Human rights in the Information Society." Its treatment of "the right to freedom of expression, information and communication" includes the assertion that existing standards of protection should apply in digital and nondigital environments alike and that any restrictions on the right should not exceed those provided for in Article 10 of the ECHR. It calls for the prevention of state and private forms of censorship and for the scope of national measures combating illegal content (e.g., racism, racial discrimination, and child pornography) to include offenses committed using information and communications technologies (ICTs). In this connection, greater compliance with the Additional Protocol to the Cybercrime Convention is also urged. The second section of the Declaration puts forward a "multi-stakeholder governance approach for building the information society," urging private sector actors to "address in a decisive manner" issues such as "hate speech, racism and xenophobia and incitation to violence in a digital environment such as the Internet."

8 Protection of Minors, Especially in an Online Environment

The Committee of Ministers' standard-setting texts aiming to protect children in an online environment tend not to employ the term "hate speech." Nevertheless, they do acknowledge the need to protect the dignity of children and to equip them with the skills to deal with the harms that result from, *inter alia*, racism and discrimination in an online environment. These acknowledgments are cursory and often merely preambular and do not lead to detailed or substantive engagement with relevant issues, except to occasionally link them to the right to freedom of expression.[111] The Committee of Ministers' Recommendation (92) 19 on video games with racist content is an exception. One of its two main points is that states' authorities

jsp?id=849061. The Declaration was submitted as a Council of Europe contribution to the Tunis Phase of the World Summit on the Information Society (WSIS) in November 2005. The WSIS was an initiative organized by the International Telecommunication Union (ITU), a UN agency under the auspices of which "governments and the private sector coordinate global telecom networks and services." The Summit was held in two phases: the first took place in Geneva in 2003 and the second took place in Tunis in 2005. *See also* World Summit on the Information Society, http://www.itu.int/wsis/.

[111] *See generally* Council of Eur., Comm. of Ministers, Recommendation (2009)5 to Member States on Measures to Protect Children Against Harmful Content and Behaviour and to Promote Their Active Participation in the New Information and Communications Environment, 1063d meeting (July 8, 2009) *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1470045&Site=CM; Council of Eur., Comm. of Ministers, Recommendation (2008)6 to Member States on Measures to Promote the Respect for Freedom of Expression and Information with Regard to Internet Filters, 1022d meeting (Mar. 26, 2008), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1266285&Site=CM; Council of Eur., Comm. of Ministers, Declaration on Protecting the Dignity, Security and Privacy of Children on the Internet, 1018th meeting (Feb. 20, 2008), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1252427&Site=CM;Council of Eur., Comm. of Ministers, Recommendation (2006)12 to Member States on Empowering Children in the New Information and Communications Environment, 974th meeting (Sept. 27, 2006), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1041181.

should "review the scope of their legislation in the fields of racial discrimination and hatred, violence and the protection of young people, in order to ensure that it applies without restriction to the production and distribution of video games with a racist content."[112]

In conclusion, notwithstanding the fact that the various standard-setting texts discussed previously are not legally binding on states, it is important to underscore their political relevance. They seek to address the problem of "hate speech" in a preventive and responsive manner, often from specific thematic angles. As already mentioned, in the past, these texts have tended to target racism, xenophobia, anti-Semitism and intolerance, and not, for example, "hate speech" focusing on gender identity, sexual orientation, age, handicap, and so forth.[113] The traditional scope of the Committee of Ministers' approach was expanded in 2010 with the adoption of a Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity.[114] The Recommendation comprises a substantive part with five recommendations and an appendix that sets out a range of relevant "principles and measures" intended as a source of guidance for member states "in their legislation, policies and practice." In respect of "hate speech," the Appendix recommends that "Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons." Those measures should be in accordance with Article 10 of the ECHR and relevant case law of the European Court of Human Rights.

[112] Council of Eur., Comm. of Ministers, Recommendation (92)19 to Member States on Video Games with a Racist Content, 482d meeting, (Oct. 19, 1992), ¶ a, *available at* https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=574903&SecMode=1&DocId=605194&Usage=. *See also* Council of Eur., Comm. of Ministers, Recommendation (2001)8 to Member States on Self-Regulation Concerning Cyber Content (Self-Regulation and User Protection Against Illegal or Harmful Content on New Communications and Information Services), 762d meeting, (Sept. 5, 2001), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=220387&Site=CM. Although Recommendation (2001)8 does not contain any provisions dealing specifically with racism or racist speech, its Preamble recalls the relevance of such issues to self-regulation of online content. It refers to, *inter alia*, Recommendation (92)19 on video games with a racist content, Recommendation (97)20 on "Hate Speech" and Article 4, ICERD.

[113] This is explained by political considerations. *See supra* note 96.

[114] Council of Eur., Comm. of Ministers, Recommendation (2010)5 to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity, 1081st meeting (Mar. 31, 2010), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1606669. It is noteworthy that the Parliamentary Assembly of the Council of Europe has followed the lead of the Committee of Ministers in this respect. *See* Eur. Parl. Ass., "Discrimination on the Basis of Sexual Orientation and Gender Identity," Resolution 1728 (Apr. 29, 2010), *available at* http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC12087.htm; Eur. Parl. Ass., "Discrimination on the Basis of Sexual Orientation and Gender Identity," Recommendation 1915 (Apr. 29, 2010), *available at* http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta10/erec1915.htm.

B. *Parliamentary Assembly*

The Parliamentary Assembly of the Council of Europe (PACE) – the organization's deliberative organ[115] – has, since 2005, adopted a range of texts focusing on specific issues that arise in the fraught relationship between the rights to freedom of expression and freedom of religion and "hate speech."[116] This sustained focus could be seen as a response to highly visible political controversies. In particular, it has coincided with the fallout from the controversial publication – initially by a Danish newspaper, *Jyllands-Posten*, on September 30, 2005 and subsequently elsewhere – of twelve cartoons that included caricatures of the Prophet Mohammed.[117] The impact of the cartoons controversy on some of the PACE's recommendations is often palpable, for example, in its call on states' authorities to officially condemn "any death threats and incitements to violence by religious leaders and groups issued against persons for having exercised their right to freedom of expression about religious matters".[118] However, the cartoons controversy was neither the initial nor sole stimulus for this focus; the groundwork for at least one of the relevant PACE texts had begun earlier – with the tabling of a Motion for a Resolution on blasphemy, religious insults, and hate speech against persons on grounds of their religion in June 2005.[119]

All of the texts in question are anchored (explicitly) in relevant provisions of the ECHR[120] and distil or draw on principles elaborated in case law of the European Court of Human Rights.[121] The essence of relevant doctrine is captured as follows.

> [I]n a democratic society, religious groups must tolerate, as must other groups, critical public statements and debate about their activities, teachings and beliefs, provided that such criticism does not amount to intentional and gratuitous insult or hate speech and does not constitute incitement to disturb the public peace or to violence and discrimination against adherents of a particular religion. Public debate, dialogue and improved communication skills of religious groups and the media should be used in order to lower sensitivity when it exceeds reasonable levels.[122]

In its attempt to map and navigate the intersections of freedom of expression, freedom of religion, and "hate speech," the PACE notes that "critical dispute" and artistic freedom have traditionally helped stimulate individual and social progress: "Critical dispute, satire, humour and artistic expression should, therefore, enjoy a wider degree of freedom of expression and recourse to exaggeration should not be seen as provocation."[123] Whereas political expression and the discussion of matters of public interest may be subjected only to narrow restrictions, States enjoy a wider margin of appreciation when regulating expression that is "liable to offend intimate personal moral convictions or religion." In addition, "[w]hat is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place."[124]

All of the foregoing observations inform the PACE's most important message: Freedom of expression, as guaranteed by Article 10, ECHR, "should not be further restricted to meet increasing sensitivities of certain religious groups," but "hate speech against any religious group is not compatible with the fundamental rights and freedoms guaranteed by the Convention and the case law of the Court."[125] This statement seeks to prevent the dilution – based on subjective religious sensitivities – of existing legal protections of freedom of expression.[126] It posits that restrictions on expression may be justified when "hate speech" is at issue, but not merely on the basis of increasing religious sensitivities. Here again, the absence of a clear and binding definition of "hate speech" is regrettable: If "hate speech" is to be deemed incompatible with everything the Convention stands for (as the PACE maintains), then it is imperative that the precise meaning of that term be fully and formally established.

The PACE's strategies to counter "hate speech" mirror those of other bodies of the Council of Europe. That is, a central feature of the PACE's approach is also the bifurcation between preventive and prohibitive measures on the one hand and promotional and facilitative measures on the other hand.

Relevant PACE texts clearly emphasize the importance of effective enforcement of national legislation prohibiting incitement to hatred, violence, or discrimination

[115] Statute of the Council of Europe, art. 22, May 5, 1949, E.T.S. No. 1 (as amended).

[116] *See, e.g.*, Eur. Parl. Ass., Recommendation 1706 on Media and Terrorism (2005), Eur. Parl. Ass., Resolution 1495 on Combating the Resurrection of Nazi Ideology (2006); Eur. Parl. Ass., Resolution 1510 on Freedom of Expression and Respect for Religious Beliefs (2006), Eur. Parl. Ass., Recommendation 1768 on the Image of Asylum Seekers, Migrants and Refugees in the Media (2006); Eur. Parl. Ass., Resolution 1563 on Combating Anti-Semitism in Europe (2007); Eur. Parl. Ass., Recommendation 1804 on State, Religion, Secularity and Human Rights (2007); Eur. Parl. Ass., Recommendation 1805 on Blasphemy, Religious Insults and Hate Speech Against Persons on Grounds of Their Religion (2007).

[117] The details of that fallout – spin-doctoring, waves of protests, threats, violence, and diplomatic and political maneuvering – have been widely reported and will not be rehearsed again here. For overviews and analysis, see *Transnational Media Events: The Mohammed Cartoons and the Imagined Clash of Civilizations* (Elisabeth Eide et al. eds., Nordicom 2008); Kevin Boyle, "The Danish Cartoons," 24 *Netherlands Q. Hum. Rts.* 185 (2006), Robert Post, "Religion and Freedom of Speech: Portraits of Muhammad," 14 *Constellations* 72 (2007); David Keane, "Cartoon Violence and Freedom of Expression," 30 *Hum. Rts. Q.* 845 (2008).

[118] Eur. Parl. Ass., Recommendation 1805 on Blasphemy, Religious Insults and Hate Speech Against Persons on Grounds of Their Religion (2007), ¶ 17.7.

[119] Explanatory memorandum to Eur. Parl. Ass., "Freedom of Expression and Respect for Religious Beliefs," Doc. No. 10970, (2006), ¶ 1.

[120] Given the religious component to most of these texts, relevant provisions are Articles 9 ("Freedom of Thought, Conscience and Religion) and 10, ECHR. *See, e.g.*, PACE Resolution 1510, *supra* note 116, PACE Recommendation 1768, *supra* note 116, PACE Recommendation 1805, *supra* note 116.

[121] By way of example, see PACE Resolution 1510, *supra* note 116.

[122] PACE Recommendation 1805, *supra* note 116, ¶ 5.

[123] Resolution 1510, *supra* note 116, ¶ 9.

[124] *Id.*, ¶ 11.

[125] *Id.*, ¶ 12, *see also* PACE Recommendation 1768, *supra* note 116; PACE Recommendation 1804, *supra* note 116, PACE Recommendation 1805, *supra* note 116.

[126] This position has been further explicated as follows: "While we have an acknowledged duty to respect others and must discourage gratuitous insults, freedom of expression cannot, needless to say, be restricted out of deference to certain dogmas or the beliefs of a particular religious community." PACE Recommendation 1804, *supra* note 116, ¶ 19.

(and to first adopt such legislation where it does not already exist). Member States are also invited to "adopt and implement penal legislation against, *inter alia*, the public dissemination or public distribution, or the production or storage of material with a racist content or purpose."[127] The PACE similarly prioritizes the effective enforcement of (national) legislation "criminalising anti-Semitic and other hate speech;" the prosecution of political parties that promote anti-Semitic ideas; the criminalization of racially motivated public denials of crimes of genocide, crimes against humanity, or war crimes; and the strengthening of legislative provisions making anti-Semitic motivation an aggravating factor in criminal cases.[128] In its Resolution, "Towards Decriminalisation of Defamation," the PACE takes its cue from General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI, see further *infra*) and calls on Member States to "make it a criminal offence to publicly incite to violence, hatred or discrimination, or to threaten an individual or group of persons, for reasons of race, colour, language, religion, nationality or national or ethnic origin where those acts are deliberate."[129] It then calls for "only incitement to violence, hate speech and promotion of negationism" to be made "punishable by imprisonment."[130]

These calls to criminalize hate speech are very worrying, given the potentially wide scope of "hate speech." In the absence of a clear and authoritative legal definition of the term at the level of the Council of Europe, Member States are likely to determine its scope as they see fit. It is not implausible that this call could legitimate national provisions for prison sentences for "lesser" forms of "hate speech." The call also sits uneasily with other passages in the Resolution "Towards Decriminalisation of Defamation," which alert to the dangers of abusive restrictions on freedom of expression.[131] Furthermore, it jars with the position taken by the PACE elsewhere, for example when it has stressed the need for "penal laws" against incitement to hatred to respect the right to freedom of expression, or insisted that any penalties imposed *be necessary* and proportionate, or called for media law and practice *to be changed* whenever "politically motivated application of such laws can be implied from the frequency and intensity of the penalties imposed."[132]

Relevant PACE texts also emphasize the importance of a range of nonprescriptive measures, in particular those aimed at fostering (structured) communicative opportunities. The promotion of dialogic interaction between religious groups is routinely encouraged, and a specific role for the media in furtherance of such interaction has

[127] PACE Recommendation 1768, *supra* note 116. In the same Recommendation, PACE also invites Member States to "adopt and implement legislation penalising leaders of groups promoting racism, and suppress public financing of organisations carrying out or supporting such activities."

[128] PACE Resolution 1563, *supra* note 116

[129] Eur. Parl. Ass., Resolution 1577, "Towards Decriminalisation of Defamation" (2007), ¶ 17.4, *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1577.htm.

[130] *Id.* at ¶ 17.5

[131] *Id.* at ¶¶ 12–15

[132] Eur. Parl. Ass., Resolution 1636, "Indicators for Media in a Democracy" (2008), ¶ 8.3.

been identified.[133] Repeated references are made to the need for media codes of conduct/ethics to include specific guidelines for tackling stereotyping and intolerance.[134] In this regard, the PACE advocates responsible reporting that generally protects vulnerable minorities, migrants, and refugees from negative stereotyping and promotes positive media representations of such groups, as well as their participation in media activities.[135] Several capacity-building measures have been suggested with respect to the latter: training, funding, and other promotional measures concerning the production and broadcasting of programs featuring minorities, including in mainstream television programs and at peak viewing times.

Flowing from its emphasis on good media practices in respect of sensitive intercultural relations, the PACE has also regularly called for media complaints bodies to be adequately equipped to deal effectively with instances of "offences to religious persuasions";[136] "intolerant, racist or xenophobic attitudes towards migrants, asylum seekers or refugees";[137] and "anti-Semitism and other forms of hate speech."[138]

Another relevant aspect of media reporting concerns the fight against terrorism. In its Recommendation, "Media and Terrorism," the PACE "invites media professionals" *inter alia* to "avoid aggravating, through their news and comments, the societal tensions underlying terrorism, and in particular to refrain from disseminating any kind of hate speech."[139]

IV. EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE

The European Commission Against Racism and Intolerance (ECRI) was established in 1993 as a specialized monitoring body of the Council of Europe.[140] ECRI's work has three main focuses: its so-called country-by-country approach (which involves

[133] PACE Resolution 1510, *supra* note 116, ¶¶ 14, 16 (referring to the role of the media); PACE Resolution 1563, *supra* note 116; PACE Recommendation 1804, *supra* note 116

[134] PACE Resolution 1510, *supra* note 116, ¶ 15; PACE Recommendation 1768, *supra* note 116; PACE Recommendation 1563, *supra* note 116 (specifically in respect of anti-Semitic stereotypes and prejudices)

[135] PACE Recommendation 1768, *supra* note 116

[136] PACE Resolution 1510, *supra* note 116, ¶ 15

[137] PACE Recommendation 1768, *supra* note 116

[138] PACE Resolution 1563, *supra* note 116, ¶ 12.14.

[139] PACE Recommendation 1706, *supra* note 116, ¶ 8(vi)

[140] "ECRI was established by the first Summit of Heads of State and Government of the member States of the Council of Europe. The decision of its establishment is contained in the Vienna Declaration which the Summit adopted on October 9, 1993. The second Summit in Strasbourg on October 10–11, 1997 strengthened ECRI's action and on 13 June 2002 the Committee of Ministers adopted an autonomous Statute for ECRI, thereby consolidating its role as an independent human rights monitoring body." ECRI *in brief* 3 (Council of Europe, 2009), *available at* http://www.coe.int/t/dghl/monitoring/ecri/activities/Ecri_inbrief_en.pdf.

the ongoing monitoring of relevant issues in Member States),[141] work on general themes (which includes the elaboration of general policy recommendations, as well as the collection and promotion of examples of "good practice" in the struggle against racism), and engagement with civil society.[142] The challenge of combating racism and intolerance in a way that is duly respectful of the right to freedom of expression is a recurrent issue in both ECRI's country-monitoring work and its work on general themes.[143]

A. *Country Monitoring*

All Member States of the Council of Europe are subject to ECRI's country-by-country monitoring. Each year, ECRI prepares reports on approximately ten countries, relying on documentary analyses, a visit to the country in question, and confidential dialogue with the relevant State authorities.[144] The monitoring work is divided into five-year cycles, the fourth of which began in January 2008.

In the first monitoring cycle, the primary aim was to document and analyze relevant issues and make pertinent recommendations for perceived shortcomings. In the second monitoring cycle, the emphasis was on follow-up to the proposals made in the first cycle, updating relevant information, and providing more in-depth analysis of selected issues of particular interest per country. The third cycle contained an explicit focus on "implementation" - that is, an examination of the extent to which ECRI's recommendations in previous reports have been effectively "followed and implemented." The third cycle also included a focus on "specific issues" per country, which were examined in more depth. Finally, the fourth cycle prioritizes "implementation and evaluation" and "new developments." Thus, alongside scrutiny for the extent to which earlier recommendations have been implemented, the policies adopted and measures taken toward those ends are also being evaluated. No (formal) sanctions arise from a failure by Member States to implement any of ECRI's recommendations. However, political pressure can be exerted in the context of confidential dialogue with states' authorities or can result from repeated negative references in the country reports.

ECRI espouses a proactive and reactive approach to countering "hate speech," similar to that pursued by the Advisory Committee on the FCNM, while remaining

[141] This system is based on country reports drawn up by ECRI on the situation regarding racism and intolerance in each of the Council of Europe Member States.

[142] For further detail, see Appendix to Resolution (2002)8, Statute of the European Commission against Racism and Intolerance (ECRI), art 1. For commentary, see Lanna Hollo, *The European Commission against Racism and Intolerance (ECRI): Its First 15 Years* (Council of Europe 2009).

[143] *ECRI Expert Seminar. Combating Racism While Respecting Freedom of Expression* 1 (November 16-17, 2006), *available at* http://www.coe.int/t/dghl/monitoring/ecri/activities/22-freedom_of_expression_seminar_2006/NSBR2006_proceedings_en.pdf

[144] Further information about the methodology employed can be gleaned from the standard foreword to all reports adopted in the context of the Fourth Monitoring Cycle

mindful of the importance of the right to freedom of expression and the differentiated roles of the media in this context. The overall pattern that emerged from the country reports in the third cycle includes recommendations for both punitive and preventive measures.

In terms of punitive measures, a recurrent recommendation is that states' authorities strengthen existing legislation prohibiting incitement to hatred[145] or ensure that existing provisions are vigorously implemented.[146] ECRI regularly recommends particular vigilance in identifying and prosecuting cases of incitement to or dissemination of hatred by media professionals.[147] ECRI often calls for the prosecution and punishment of the authors or publishers of racist articles.[148] Some of the recommendations for punitive measures specifically concern racist and xenophobic material on the Internet.[149] The specificity of such a focus demonstrates the growing nature of the problem, yet such recommendations are by no means systematic in ECRI's country reports. This begs the question of whether, first, the problem exists to the same extent in all states, and second, whether the problem is perceived as being equally pressing in all states

Alongside its recommendations for prosecution and punishment in a system built around legislation and the courts, other recommendations call for the adoption[150] and/or implementation[151] by the media sector of self-regulatory codes that would include provisions on racism, discrimination, and responsible reporting on minorities. The frequency of such recommendations indicates ECRI's awareness of, and deference to, the principle of media autonomy, which is a central principle of the Council of Europe's approach to freedom of expression. ECRI's commitment to this principle is even more obvious in its regular encouragement of the state authorities to "impress on the media, without encroaching on their editorial independence, the need to ensure that reporting does not contribute to creating an atmosphere of hostility and rejection towards members of any minority groups."[152] This recommendation usually includes an important corollary, namely that the state's authorities "engage in a debate with the media and members of other relevant civil society groups on how this could best be achieved."[153]

[145] *See, e.g.*, Denmark, ¶ 92; Norway, ¶ 101, Former Yugoslav Republic of Macedonia, ¶ 95.

[146] *See, e.g.*, Denmark, ¶¶ 20, 86, 87, 107; Latvia, ¶ 106, Lithuania, ¶ 62; Russia, ¶ 120.

[147] Czech Republic, ¶ 65; Luxembourg, ¶ 77, Romania, ¶ 113; Russia, ¶ 120, Sweden, ¶ 9.

[148] Bulgaria, ¶ 63, Croatia, ¶ 82, Estonia, ¶ 115 (the phrase, "duly prosecuted," is used here instead of the reference to "prosecute and punish"), Greece, ¶ 98; Poland, ¶ 79; Turkey, ¶ 100.

[149] Finland, ¶ 91; France, ¶ 107, Germany, ¶ 111, Lithuania, ¶ 64, Portugal, ¶ 92; Sweden, ¶ 83.

[150] Albania, ¶ 70; Austria, ¶ 73, Czech Republic, ¶ 65, Germany, ¶ 78; Turkey, ¶ 100

[151] Austria, ¶ 73, Belgium, ¶ 59; Germany, ¶ 78; Hungary, ¶ 85, Norway, ¶ 80, Former Yugoslav Republic of Macedonia, ¶ 94.

[152] *See, e.g.*, Cyprus, ¶ 90; Finland, ¶ 90; Italy, ¶ 79; Latvia, ¶ 108, Lithuania, ¶ 63, Russia, ¶ 121, Spain, ¶ 86, Ukraine, ¶ 104.

[153] *See, e.g.*, Cyprus, ¶ 90, Finland, ¶ 90, Italy, ¶ 79; Latvia, ¶ 108; Lituania, ¶ 63, the Netherlands, ¶ 97; Russia, ¶ 121, Spain, ¶ 86

ECRI also has sought to harness the potential role that freedom of expression can play in countering racist speech by encouraging (rather than prescribing, again out of deference to the principle of media autonomy) more and better media coverage of minority issues.[154] To this end, it has recommended more state support for training schemes for media professionals on issues such as reporting in a diverse society,[155] human rights, racism, racial discrimination,[156] and anti Semitism [157] The ECRI also recommends greater representation of persons from immigrant backgrounds in the media profession.[158] This approach is based explicitly on the assumption that the enhanced representation of immigrants in media structures will have a positive impact on the representation of immigrants in media output.

ECRI also underscores the general importance of access to electronic and print media for persons belonging to minorities,[159] as well as the specific importance of ensuring the "adequate availability of electronic media in the language of national minorities."[160] The promotion via the media of minority identities[161] and of "an atmosphere of appreciation of diversity"[162] is also recommended, as is the creation of a shared forum in which separate linguistic communities can receive the same information, with a view to strengthening intergroup relations.[163]

B. *Work on General Themes*

ECRI's General Policy Recommendations (GPRs) are the mainstay of its work on general themes. It has issued twelve GPRs:

1. Combating racism, xenophobia, antisemitism and intolerance (1996)
2. Specialised bodies to combat racism, xenophobia, antisemitism and intoler ance at national level (1997)
3. Combating racism and intolerance against Roma/Gypsies (1998)
4. National surveys on the experience and perception of discrimination and racism from the point of view of potential victims (1998)
5. Combating intolerance and discrimination against Muslims (2000)

[154] Albania, ¶ 71, Austria, ¶ 74, Former Yugoslav Republic of Macedonia, ¶ 137

[155] Austria, ¶ 73; Germany, ¶ 78

[156] Denmark, ¶ 108; Estonia, ¶ 115; Romania, ¶ 112 ("national and local media training courses on combating discrimination"), Slovakia, ¶ 91 (this provision is directed at "professionals," presumably including, although without specifying, "media" professionals)

[157] Luxembourg, ¶ 77

[158] Austria, ¶ 73, Belgium, ¶ 60, France, ¶ 105 (and see also ¶ 104 for details of a positive initiative in this connection); Germany, ¶ 78, Norway, ¶ 80. In these examples, references to "the press" are presumably expansive, i.e., to the press as an institution It is submitted here that "the media" would have been a more suitable term.

[159] Albania, ¶ 72.

[160] Austria, ¶ 74

[161] Slovenia, ¶¶ 73–74

[162] Albania, ¶ 70

[163] Estonia, ¶ 114

6. Combating the dissemination of racist, xenophobic, and antisemitic material via the Internet (2000)
7. On national legislation to combat racism and racial discrimination (2002)
8. On combating racism while fighting terrorism (2004)
9. On the fight against antisemitism (2004)
10. On combating racism and racial discrimination in and through school education (2006)
11. On combating racism and racial discrimination in policing (2007)
12. On combating racism and racial discrimination in the field of sport (2008)

The first obvious strength of ECRI's thematic approach is the opportunity it affords to identify particular issues and grapple with their specifics in a detailed and rigorous fashion For example, some of GPR No. 12's specific recommendations to combat racism and racial discrimination in sport are directed at various parties, including legislative and other authorities, police, sports organizations, athletes, coaches, referees, supporters' organizations, politicians, the media, and sponsors and advertisers.[164] In this context, recommended measures concerning the media are nonprescriptive, thereby respecting the principle of media autonomy. Member States are called on to "encourage the media"

a) to abstain from reproducing racist stereotypes in their reporting;
b) to pay the necessary attention to the image that they convey of minority groups in sports; and
c) to report on racist incidents taking place during sport events and to give publicity to sanctions incurred by racist offenders.

GPR No 12 also contains provisions involving other freedom-of-expression issues. For instance, the police are requested to "identify and remove racist, antisemitic or discriminatory leaflets, symbols and banners." Similarly, sports federations and clubs are invited to "refuse access to sport grounds to persons who distribute or carry with them racist, antisemitic or discriminatory leaflets, symbols or banners." Supporters' organizations are encouraged to "be vigilant about possible racist content on their websites and fanzines." For their part, sponsors and advertisers are encouraged, *inter alia*, to "avoid giving a stereotyped picture of athletes from minority backgrounds." These last-named examples are largely self-regulatory in character insofar as they seek to promote a sense of responsibility within various organizations and promote practical measures/remedies as opposed to prescribing courses of action

Unfortunately, ECRI's GPRs sometimes fail to identify and affirm the necessary linkage between equality/nondiscrimination provisions of European and international human rights standards and protections of other human rights, most notably

[164] Eur. Comm. Against Racism and Intolerance, General Policy Recommendation No. 12 on Combating Racism and Racial Discrimination in the Field of Sport, Doc No. CRI (2009)5 (March 19, 2009).

freedom of expression and association. In GPR No. 6, for instance, ECRI's pursuit of the elimination of racist and xenophobic content online is fails adequately to acknowledge and weigh freedom of expression interests. The GPR's preamble invokes GPR No. 1:

> Recalling that, in its general policy recommendation No 1, ECRI called on the governments of Council of Europe member States to ensure that national criminal, civil and administrative law expressly and specifically counters racism, xenophobia, antisemitism and intolerance
>
> Stressing that, in the same recommendation, ECRI asked for the aforementioned law to provide in particular that oral, written, audio-visual expressions and other forms of expression, including the electronic media, inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group are legally categorised as a criminal offence, which should also cover the production, the distribution and the storage for distribution of the material in question.

This citation of GPR No. 1 is abridged, however, although no indication is given that this is the case In fact, GPR No. 1 only countenanced criminalization of these types of expression "in conformity with the obligations assumed by States under relevant international instruments and in particular with Articles 10 and 11 of the European Convention on Human Rights." The omission of this caveat – a departure from the language used in its own standards – suggests that in GPR No. 6, the ECRI has overlooked the importance of Articles 10 and 11 (Freedom of assembly and association) of the ECHR in its combat against dissemination of racist, xenophobic, and anti-Semitic material via the Internet. More concretely, the omission removed all reference to the key legally binding provisions that could be invoked to specify the safeguards required for the criminalization of certain types of expressive activity to be considered legitimate.

Admittedly, GPR No. 6 does acknowledge the Internet's potential for combating racism, *inter alia*, through self-regulatory measures, the transfrontier sharing of information concerning "human rights issues related to anti-discrimination," and the (further) development of educational and awareness-raising networks. Nevertheless, the absence of references to ECHR guarantees of freedom of expression and other pertinent rights conveys the impression of a document that is disappointingly selective in terms of the range of its sources of inspiration. Closer conceptual and linguistic alignment with the ECHR would have pointed to a body of relevant judicial pronouncements, thereby offering authoritative interpretative consistency and clarity.

A second strength of ECRI's thematic approach is that it enables more generous attention to be given to specific groups, for example those groups that have traditionally suffered – and continue to suffer – from racist discrimination. This is illustrated by the GPRs focusing on the Roma/Gypsies, Muslims, and anti-Semitism. These

policy recommendations are very important as they address the root causes of racism and not merely its concrete manifestations. As such, they look at situational and systemic discrimination and explore ways of countering and eliminating the same.

The third strength of the thematic approach to combating racism is that it has provided ECRI with a very useful means to address policy, institutional, and methodological/procedural questions. GPR No. 1, entitled "Combating racism, xenophobia, antisemitism and intolerance,"[165] stands out among other GPRs for its recognition that international law is the backdrop to the struggle against racism, and that the obligations imposed on states by international law must remain salient. GPR No. 7 on national legislation to combat racism and racial discrimination[166] – is somewhat weaker in that regard, but its shortcomings are offset to some extent by its accompanying Explanatory Memorandum, which offers useful explanatory detail on the recommendations concerning constitutional, civil and administrative, and criminal law.[167]

When assessing ECRI's thematic work at the macro level, two main points should be made The thematic approach pursued by ECRI very importantly allows it to be responsive to changing agendas of racism and racial discrimination. By setting its own thematic agenda, ECRI has also managed to be proactive in its decisions to pursue certain topics. This is conducive to fostering dynamic working methods. However, the GPRs do not always reflect the letter of international-law provisions. Nor do they always manage to achieve the desirable, and indeed necessary, respect for other fundamental rights.

V MINISTERIAL CONFERENCES ON MASS MEDIA POLICY

European Ministerial Conferences on Mass Media Policy have been held periodically since the mid-1980s. These conferences involve the participation of ministers (or their delegates) with relevant portfolios at the national level. As such, the Ministerial Conferences can be distinguished from the day-to-day activities of the Council of Europe. Their relevance stems from their purpose to map out future European media policy, supplemented by action plans for its implementation. The preparation of these Conferences and the implementation of resultant Action Plans are overseen by the Council of Europe's Steering Committee on Media and New Communication Services (CDMC) an expert body comprising members nominated

[165] Eur. Comm Against Racism & Intolerance, General Policy Recommendation no 1 on Combating Racism, Xenophobia, Antisemitism and Intolerance, Doc No CRI(96)43 rev (October 4, 1996)

[166] Eur Comm Against Racism & Intolerance, General Policy Recommendation No 7 on National Legislation to Combat Racism and Racial Discrimination, Doc. No. CRI(2003)8 (December 13, 2002)

[167] For further commentary, see Giancarlo Cardinale, "The Preparation of ECRI General Policy Recommendation No 7 on National Legislation to Combat Racism and Racial Discrimination," in Jan Niessen and Isabelle Chopin, Eds , *The Development of Legal Instruments to Combat Racism in a Diverse Europe* 81- 92 (Martinus Nijhoff 2004)

by Member States of the Council of Europe.[168] To reflect changing notions of the media, the most recent conference was calibrated differently – as the "1st Council of Europe Conference of Ministers responsible for Media and New Communication Services."[169]

Of the seven Conferences on Mass Media Policy, the fourth, fifth, and seventh have most directly engaged with the issues of "hate speech" or tolerance and intolerance in the media. Two texts adopted at the fourth European Ministerial Conference on Mass Media Policy,[170] held in 1994, are relevant. In Resolution No. 2: Journalistic Freedoms and Human Rights, Principle 7(f) sets out generally that the "practice of journalism in a genuine democracy" implies "avoiding the promotion of any violence, hatred, intolerance or discrimination based, in particular, on race, sex, sexual orientation, language, religion, politics or other opinions, national or regional origin, or social origin." In the Declaration on media in a democratic society, the ministers of participating states condemn, "in line with the Vienna Declaration, all forms of expression which incite to racial hatred, xenophobia, anti-Semitism and all forms of intolerance, since they undermine democratic security, cultural cohesion and pluralism."[171] They also affirm "that the media can assist in building mutual understanding and tolerance among persons, groups and countries and in the attainment of the objectives of democratic, social and cultural cohesion announced in the Vienna Declaration."[172] These two principles again reflect the conceptual bifurcation between curbing hate speech and promoting understanding and tolerance – a distinction that (by and large) consistently has been adhered to throughout relevant Council of Europe instruments. Relatedly, in the Action Plan adopted at the Conference, it was proposed that the Committee of Ministers of the Council of Europe "[s]tudy, in close consultation with media professionals and regulatory authorities, possible guidelines which could assist media professionals in addressing intolerance in all its forms."[173] This proposal provided important impetus to the process that led to the drafting of the Committee of Ministers' Recommendations on "hate speech" and on the media and the promotion of a culture of tolerance.[174]

[168] Terms of Reference of the Steering Committee on Media and New Communication Services (CDMC), n d , *available at* http://www.coe.int/t/dghl/standardsetting/media/CDMC/default_en.asp, ¶ 4(iv)

[169] *A New Notion of Media?*, May 28–29, 2009, Reykjavik, Iceland, http://www.coe.int/t/dc/files/ministerial_conferences/2009_media_communication/default_en.asp

[170] *The Media in a Democratic Society*, Dec. 7–8, 1994, Prague, http://www.ebu.ch/CMSimages/en/leg_ref_coe_mcm_resolution_psb_07_081294_tcm6–4274.pdf.

[171] *Id* , Principle 7.

[172] *Id* , Principle 8

[173] Action Plan setting out strategies for the promotion of media in a democratic society addressed to the Committee of Ministers of the Council of Europe (Feb. 1, 1995), Point 6: "Media and intolerance," *available at* http://www.coe.int/t/dghl/monitoring/minorities/6_resources/PDF_CAHMIN(95)3_en.pdf.

[174] As mentioned *supra*, that process was initiated at the Vienna Summit of Heads of State and Government of the Council of Europe Member States in 1993

The fifth European Ministerial Conference on Mass Media Policy,[175] held in 1997, paid the greatest attention to issues related to hate speech. Paragraphs 11 and 12 of the Political Declaration adopted at that Conference refer in general terms to the potential and risks of new communications and information services. In a similar vein, Resolution No. 1: The impact of New Communication Technologies on Human Rights and Democratic Values, emphasizes the ministers' condemnation of the use of new technologies and services "for spreading any ideology, or carrying out any activity, which is contrary to human rights, human dignity, and democratic values," as well as their resolve to "combat such use."[176]

Resolution No. 2: Rethinking the Regulatory Framework for the Media, calls on participating states to give domestic effect to the principles enshrined in the Committee of Ministers' Recommendations on, *inter alia*, "hate speech" and on the media and the promotion of a culture of tolerance.[177] It also calls on states' authorities "to ensure that measures for combating the dissemination of opinions and ideas which incite to racial hatred, xenophobia, anti-Semitism and all forms of intolerance through the new communications and information services duly respect freedom of expression and, where applicable, the secrecy of correspondence."[178] The reinforcement of cooperation within the Council of Europe, while liaising with other IGOs and "interested professional organisations," is also advocated.[179] Such cooperation should have standard-setting aspirations, initially for Europe and later more widely. The suggested focus is on "problems of delimiting public and private forms of communication, liability, jurisdiction and conflict of laws in regard to hate speech disseminated through the new communications and information services."[180]

The Conference's Action Plan calls for study of "the practical and legal difficulties in combating the dissemination of hate speech, violence and pornography via the new communications and information services, with a view to taking appropriate initiatives in a common pan-European framework." As already mentioned, it also calls for the "periodical evaluation" of Member States' "follow-up" to the Committee of Ministers' Recommendations on, *inter alia*, "hate speech" and on the media and the promotion of a culture of tolerance. In addition, it seeks a periodical evaluation of the implementation of Article 7, European Convention on Transfrontier Television, by Member States, particularly as regards the "responsibilities of broadcasters with regard to the content and presentation of their programme services." Finally, it provides for an examination – "as appropriate" – of the "advisability of preparing in addition other binding or non-binding instruments."[181]

[175] *The Information Society – A Challenge for Europe* (Dec. 11–12, 1997), http://www.coe.int/t/dghl/standardsetting/media/doc/DH-MM(2006)004_en.pdf.

[176] *Id.*, Resolution No. 1, ¶ 9, *see also id* , ¶ 19(i) (reiterating these points in very similar language).

[177] *Id* , Resolution No. 2, ¶ 8(i).

[178] *Id* , ¶ 8(ii)

[179] *Id* , ¶ 8(...)

[180] *Id.*, ¶ 8(...).

[181] *Id* , Action Plan, ¶¶ 1–7

At the seventh European Ministerial Conference on Mass Media Policy, held in March 2005, the ministers undertook, *inter alia*, to "step up their efforts to combat the use of the new communication services for disseminating content prohibited by the Cybercrime Convention and its additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems."[182]

Finally, it should be noted that the political texts adopted at the first Council of Europe Conference of Ministers Responsible for Media and New Communication Services – "A new notion of media?" – pay minimal attention to "hate speech." This is difficult to explain, given that (1) there is a real resurgence of "hate speech" in a new media context, which poses considerable regulatory challenges, and (2) the purpose of the Conference was to map out priorities in European media policy to be addressed by the Council of Europe in the coming years.

VI. THE VENICE COMMISSION

In October 2008, the European Commission for Democracy through Law (the Venice Commission, i.e., the Council of Europe's advisory body on constitutional matters), issued a report on the relationship between freedom of expression and freedom of religion generally and the regulation and prosecution of blasphemy, religious insult, and incitement to religious hatred in particular.[183] Noting that national legislation in one country or another prohibits the disturbance of religious practice, blasphemy, religious insult, negationism, discrimination (including on religious grounds), and incitement to hatred, the report addresses three main issues.

The first concerns the scope of prohibitions. The Commission found that incitement to hatred, including religious hatred, is properly the object of criminal sanctions in almost all European states. In contrast, "it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component."[184] Similarly, the offense of blasphemy should be abolished and not be reintroduced.[185]

The second issue concerns criminal punishment. The report concluded that "criminal sanctions are only appropriate in respect of incitement to hatred (unless public order offences are appropriate),"[186] and that "criminal sanctions are inappropriate in respect of insult to religious feelings and, even more so, in respect of blasphemy."[187]

Finally, regarding alternatives to criminal sanctions, the Commission referred to a "new ethic of responsible intercultural relations in Europe and in the rest of the world" and stressed values such as tolerance, diversity, mutual understanding, and open debate.[188] It pointed to the relevance of dialogue, education, and relevant PACE Recommendations and those of the European Commission against Racism and Intolerance (ECRI) for the promotion of such values.

VII. CONCLUSIONS

To summarize a very expansive set of standards and concomitant strategies, it can be said that the three main prongs to the Council of Europe's approach to countering "hate speech" are: (1) the prevention/prohibition/punishment of certain types of expression (e.g., incitement to hatred, racist expression); (2) the facilitation and creation of expressive and communicative opportunities for minorities; and relatedly, (3) the promotion of tolerance, understanding, and intergroup/intercultural dialogue. By virtue of their agenda-setting and forum-providing capacities, the media are specifically implicated in many of the strategies employed, but in a way that is deferential to their operational autonomy

All of the Council of Europe standards share the ECHR as their central reference point. The scope of Articles 10 and 17 of the Convention and the interplay between them shape the European Court of Human Rights' approach to "hate speech." The Court's future engagement with the term will be crucial for the clarification of the term's scope and the consolidation of its case law dealing with relevant issues. In the absence of a legally binding definition of the term "hate speech," or a clear and consistent set of evaluation criteria for types of expression that could potentially amount to "hate speech," the scope and content of the term remain uncertain. This uncertainty has very practical (legal) consequences. Certain types of expression may be highly objectionable from a moral point of view, without actually triggering restrictions on, or prohibitions of, expression in accordance with recognized international human rights standards. Moreover, not all types of highly objectionable expression occasion, or are likely to occasion, similarly grave harms. Thus, legally binding approaches to "hate speech" ought to duly recognize the variety of types of expression and resultant harms that "hate speech" could be taken to signify

[182] 7th European Ministerial Conference on Mass Media Policy (Mar 10-11, 2005), Resolution No 3, "Human rights and regulation of the media and new communication services in the Information Society," ¶ 18, *see also* Tarlach McGonagle, "Ministerial Conference on Mass Media Policy," 7 *IRIS – Legal Observations of the European Audiovisual Observatory* 2 (2005)

[183] European Commission for Democracy through Law (Venice Commission), Report on the Relationship Between Freedom of Expression and Freedom of Religion. The Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, Doc No. CDL-AD(2008)026 (Oct 17–18, 2008), *available at* http://www venice.coe.int/docs/2008/CDL-AD%282008%29026-e asp The Report was produced in response to a request from the PACE following its adoption of Resolution 1510, described earlier. *See supra* note 116 and accompanying text.

[184] European Commission for Democracy through Law (Venice Commission), *supra* note 183, ¶ 89(b)

[185] *Id.*, ¶ 89(c).

[186] *Id.*, ¶ 91

[187] *Id.*, ¶ 92.

[188] *Id.*, ¶¶ 95 *et seq*

The selection of legal remedies for "hate speech" should be based, therefore, on principled assessments of the nature of any impugned expression, a range of relevant contextualizing factors, and the specific harms to be prevented or minimized. These arguments are also applicable, *mutatis mutandis*, to nonlegal remedies. In the context of the Council of Europe, it is imperative that the requisite differentiation be reflected in the case law of the European Court of Human Rights, precisely because the Court's interpretation of the ECHR is the point of inspirational departure for all the Council of Europe's other strategies for tackling "hate speech." Even though the preparation and implementation of the Council of Europe's standards and strategies against "hate speech" are not formally coordinated, they are broadly congruent. This can be attributed to their common provenance. Glitches in their overall congruence will inevitably persist, but greater clarity and consistency in the relevant case law of the Court would likely reduce the incidence of the same.

Finally, the foregoing criticism of the definitional and interpretive shortcomings of the Court should not detract from the merits of the Council of Europe's overall approach, which boasts an array of diverse standards and strategies against "hate speech." The diversity of approaches offers the various organs of the Council of Europe ample scope to simultaneously address the problem of "hate speech" in both a preventive and a responsive fashion. This makes for effective engagement with the range of fundamental *issues* involved. Nevertheless, the effectiveness of measures that are not legally binding is largely contingent on the goodwill of the states' authorities or other actors (e.g., the media) to which they are addressed. Addressing this challenge will therefore remain a work in progress for some time to come.

25

The American Convention on Human Rights

Regulation of Hate Speech and Similar Expression

Eduardo Bertoni and Julio Rivera Jr.

Hate speech is defined by both its intent and its target. With respect to intent, hate speech is speech designed to intimidate, oppress, or incite hatred or violence on the basis of characteristics such as race, religion, nationality, gender, sexual orientation, or disability. With respect to its target, it is speech directed against a person or group based on such characteristics. Historically, hate speech has known no boundaries of time or place. It has been used by officials and others in Nazi Germany, by the Ku Klux Klan in the United States, by a full range of actors in Bosnia during the 1990s, and during the 1994 Rwandan genocide. But hate speech has a common thread: It is used to harass, to persecute, and to justify the deprivation of human rights. At its most extreme, hate speech can be used even to rationalize murder, as the world saw just a few years ago in Rwanda.

In the wake of the German Holocaust, and with the rise of the Internet and other media that can spread hate speech almost instantaneously, many governments and intergovernmental bodies have tried to limit the harmful effects of hate speech. Around the world, countries have criminalized incitement to hatred or violence; degrading, defamatory, or insulting speech;[1] the display of discriminatory symbols

[1] For example, the German penal code provides.

> Whosoever, in a manner capable of disturbing the public peace,
>
> 1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or
> 2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be liable to imprisonment from three months to five years
>
> shall be liable to imprisonment from three months to five years.

Strafgesetzbuch [Stgb] [Penal Code], Nov. 13, 1998, BGBl I § 130(1)

This chapter draws in part on Eduardo Bertoni, "Hate Speech Under The American Convention On Human Rights," 12 *ILSA Journal of International & Comparative Law* 569 (2006), which was a revision of oral remarks presented at the International Law Weekend 2005, held at the Association of the Bar of the City of New York, October 20–22, 2005. Those remarks were in turn based in part on chapter VII of the 2004 *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, Inter-American Commission on Human Rights, Organization of American States.

26

Orbiting Hate? Satellite Transponders and Free Expression

Monroe E. Price

I. INTRODUCTION

In this chapter, I deal with the consequences of two significant changes, an expansion – a rather substantial one – in the categorization of various kinds of expression under the loose rubric of "hate speech" and simultaneously the increasing use of satellites to hurl this speech around the world. I examine a series of case studies dealing with programming transmitted by satellite that is connected to division and conflict – in these cases, conflict mostly related to societies in the Middle East.

One might anticipate that regulatory crises occur when organized and often status quo-disruptive senders shape a persistent and effective set of messages to be transmitted within a society and/or across national boundaries as part of an overall effort to gain substantial influence on target populations. As the case studies will show, when such messages have been transmitted by satellites, they have produced decisions by governments and powerful groups that have been almost invisible and exist outside a clear legal framework of articulated norms and transparent processes. One feature is paramount: Formal regulation of the content of satellite transmissions, including of speech with alleged attributes of hate, with few exceptions, rarely has been an effective theater for playing out governmental interests in satellite signal diffusion. There is also a lack of scholarly literature on the ways in which governments seek to control or affect the functioning of satellite services and their transnational distributions. In a sense, this underscores a major point: Decisions to allow or prohibit distribution of satellite signals have been treated more as strategic business decisions than as an interplay between national interests and free-expression values. Having these decisions take the form of leasing and subleasing of transponders, they become mere economic transactions, underplaying their role as modes of intervening in

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national public spheres. In addition, because there is a relative absence of judicial decisions or similar official documents, observers must rely largely on reportorial and journalistic accounts and on information gleaned from Web sites and other unofficial sources.

The challenge is to extract from the anecdotal a better understanding of the strategic decisions being made, of what amounts to a "common law" of what kinds of content states informally ban on satellite and, even more specifically, of the interactions between content and the instruments of power. Instead of a deliberate system, there exists a hodgepodge of practices and efforts, often desperate, by states or regional and international entities to intervene when a crisis occurs or is perceived to occur.[1] As I shall note, there is the beginning of a tendency to render these decisions more formal. Only then will there be the possibility of a rule-of law analysis of the quality and defensibility of state decisions.

The international debate over how and whether to regulate satellite transmissions has gone through several phases, starting with an extensive effort (that ended in tatters) in the United Nations to design a system of international standards.[2] Ownership and control have affected the debate in all its phases, and strategic considerations have played a role in the ownership structure of satellites from the outset. Initially, satellites were in transnational hands or controlled by the United States. The creation of Intelsat as a public entity was a way of acknowledging the conditions of control that might accompany an entirely new mode of transmitting information.[3] It was hardly an implementation of unfettered access to transponders. Privatization of satellites and competition removed one of the more automatic modes of control.[4] Now, in the post-9/11 world, after the industry has grown, and as the world seems more preoccupied with the role of mediated expression in the battle for hearts and minds, there are renewed attempts at regulation and control, using "hate speech" like labels as justification. The considerations that informed the first stage – the

[1] Given the magnitude of the subject, the scope of the discussion is limited in this chapter. For example, the International Telecommunications Union and governance in terms of the allocation or assignment of orbital slots is addressed. The debate there concerning equitable distribution of orbital positions and first come–first served, has been often told. This chapter will focus on a line of questioning arising out of an earlier work, Monroe Price, "Satellite Broadcasting as Trade Routes in the Sky," in *In Search of Boundaries: Communication, Nation States and Cultural Identities* 146 (Joseph M. Chan & Bryce T. McIntyre eds., Ablex Publishing 2002). The question raised there is whether, rather than looking for a universal or global governance scheme, we can identify different regional themes, different forms of state intervention that turn on particular satellites, particular footprints, or particular content. Put in metaphorical terms, does the law governing this trade depend on the ship, the port of call, the freight, or some combination thereof?

[2] *See* Kathryn M. Queeney, *Direct Broadcast Satellites and the United Nations* (Sijthoff & Noordhoff 1978).

[3] *See* Leland L. Johnson, *The Future of INTELSAT in a Competitive Environment* (Rand Corp. 1988), Kenneth Katkin, "Communication Breakdown? The Future of Global Connectivity after the Privatization of INTELSAT," 38 *Vand. J. Transnat'l L.* 1323 (2005).

[4] *See* Katkin, *supra* note 3.

UN debate – are present again, but the geopolitical considerations mean different positions for key players.[5]

II. THE UNITED NATIONS, THE PRIOR CONSENT DEBATE, AND THE ARTICULATION OF ISSUES

"Freedom of expression" norms and their application to hate speech arose at an early stage at the UN. Almost as soon as the extraordinary science-fiction laden prospect of direct-to-home satellite communication became widely seen as actually possible, the UN took up the question of whether international regulation would be desirable. After all, the sending of a signal from one country into the territory of another could be seen either as a triumph of free expression or as a potential violation of national sovereignty (or both).[6] Indeed, most terrestrial broadcasting regulation, at least on the multilateral level, had been established on the idea that in medium- and long-wave there should be some sort of agreement for the management of broadcasting signals so that national borders were respected and what might be called "intended spillover" was minimized.[7] A similar idea – requiring prior consent before a satellite signal is sent transnationally – was debated in both the UN and the UN Education, Scientific and Cultural Organization ("UNESCO") from the late 1960s to the early 1980s.[8]

[5] For example, Canada's novel mode of determining whether Al Jazeera could be carried on cable services; the application of the U.S. Terrorism Exclusion list in the case of Al Manar, and domestic informal and formal pressures related to the difficulty of Al Jazeera International in gaining shelf space on U.S. cable systems.

[6] *See* Colby C. Nuttall, 'Defining International Satellite Communications as Weapons of Mass Destruction. The First Step in a Compromise Between National Sovereignty and the Free Flow of Ideas," 27 *Hous. J. Int'l L.* 389 (2005) (discussing the framing of the debate as conflicting perspectives of governing principles, with some states supporting a "free flow of information" and other states supporting "national sovereignty").

[7] For most of the twentieth century, the international consensus was that radio transmissions should be contained primarily within the boundaries of one nation, the international function, performed mainly through the International Telecommunications Union ("ITU"), was to dispense frequencies so as to assure that conditions of market division along national borders could be realized and enforced. Between the world wars, there were bilateral and multilateral agreements to control propaganda subversive to the state system. For example, the League of Nations sponsored the International Convention Concerning the Use of Broadcasting in the Cause of Peace, which provided:

> The High Contracting Parties mutually undertake to prohibit and, if occasion arises, to stop without delay the broadcasting within their respective territories of any transmission which to the detriment of good international understanding is of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory of a High Contracting Party

International Convention Concerning the Use of Broadcasting in the Cause of Peace, Sep. 23, 1936, 186 L.N.T.S. 301 art. 1 (1936) (highlighting states' continuing "struggle with the question of whether to use law to protect transnational systems or to enhance international freedom to communicate").

[8] For details of debates on the prior consent requirement in particular and regulation of direct broadcasting by satellite in general, see Queeney, *supra* note 2; *National Sovereignty and International Communication* (Kaarle Nordenstreng & Herbert I. Schiller eds., Ablex Publishing 1979); Jon T. Powell, *International Broadcasting by Satellite: Issues of Regulation, Barriers to Communication* (Quorum Books 1985).

The main forum for this debate was the UN Committee on the Peaceful Uses of Outer Space ("COPUOS"),[9] which was established in 1958 and was responsible for creating the five major treaties that regulate activities in space. These treaties concern the use and exploration of space; the rescue and return of astronauts and objects launched into space; liability for damage caused by space objects; registration of objects launched into space; and the use and exploitation of the moon.[10] Members of COPUOS's working group argued for "a prohibition on broadcasts beamed from satellites by one State to others without the explicit prior consent of the Government concerned through bilateral or multilateral agreements."[11] Quite quickly, the debate became a forum for rehearsing Cold War feints and parries, and for consideration of the relationship of satellite transmissions to spheres of influence. The Soviet Union, supported by many developing countries, fought for a prior-consent requirement (the USSR claiming it desired to limit political propaganda and hate-oriented speech, others more concerned with the impact on economic development and cultural heritage). Arguments over what were called direct broadcasting services were linked closely to debates on the free flow of information and agitation for the "New World Information and Communication Order."[12] The United States, along with several allies, opposed all restrictions, asserting a commitment to principles of free expression.[13] The debates stretched back to long-standing information strategies of West and East, and the framing of political ideologies in the specific context of the free flow of information.

The result of this conflict was failure to pass a binding international treaty on the regulation of direct broadcast satellites. Rather, in 1982, the UN General Assembly

[9] Nuttall, *supra* note 6, at 394 (describing UN's creation of the Committee on the Peaceful Uses of Outer Space ("COPUOS") in 1958 to acknowledge "the international challenges that space exploration [and satellite communications] could present" and the committee's focus "on developing workable international standards, policy, and law that t[ook] into account these new and developing challenges and their potential threat to international peace")

[10] Alexandra M. Field, "INTELSAT at a Crossroads," 25 *Law & Pol'y Int'l Bus.* 1335 (1994)

[11] U.N. GAOR, Comm. on the Peaceful Uses of Outer Space, Working Group On Direct Broadcast Satellites, "Report of the Second Session of the Working Group," ¶ 7 U.N. Doc. A/AC.105/66 (Aug. 12, 1969); *see also* U.N. GAOR Comm. on Peaceful Uses of Outer Space, "Broadcasting from Satellites, Working Paper Submitted by France to the Second Session of the Working Group on Direct Broadcast Satellites," 32, 34, U.N. Doc. A/AC.105/PV.62 (June 30, 1969) (discussing Soviet position), Marika N. Tashoff, *State Responsibility and the Direct Broadcast Satellite* 34 (Pinter 1987) (describing Soviet fear of harmful propaganda)

[12] *See, e.g.*, Thomas L. McPhail, *Electronic Colonialism: The Future of International Broadcasting and Communication* 162 (Sage Publications 1987), Seán Ó Siochrú and Bruce Girard, *Global Media Governance: A Beginner's Guide* 77 (Rowman & Littlefield 2002).

[13] *See* Frank Stanton, "Will they Stop our Satellites," N.Y. *Times*, Oct. 22, 1972, at D23, *see also* Nuttall, *supra* note 6 (discussing the United States' ardent support of the free flow of information and objection to virtually any interference with the right to impart information through any media form)

adopted Resolution 37/92, Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting.[14] The explicit principle of requiring "prior consent" of the receiving countries was abandoned,[15] but paragraph 8 of the nonbinding document provided "States should bear international responsibility for activities in the field of international direct television broadcasting by satellite carried out by them or under their jurisdiction."[16] This reflected the alternative approach developed during the UN and UNESCO debates: a set of internationally agreed on standards with the originating country being responsible for ensuring that no signal emanating from its territory would violate such standards, including those related to hate speech norms.[17]

As we shall see, the basic issues that guided national strategies in the UN debate continue to guide decisions concerning satellite communications today. The prior consent principle – granting that a state, even in the face of the right of an individual to receive and impart information,[18] should have some say over the receipt of satellite signals within its borders – lurks. So too does the alternative principle, namely that there should be common standards (global, regional, or national) determining the content of what is transmitted or received using satellite platforms. These approaches exist as artifacts that find their way into contemporary actions and debates, albeit not as universal principles and very seldom with reference to their

[14] G.A. Res. 2916, U.N. GAOR, 37th Sess., Supp. No. 92, 100th meeting, U.N. Doc. A/Res/37/92 (1982), http://www.un.org/documents/ga/res/37/a37r092.htm (107 countries voted for the resolution, 13 voted against, and 13 abstained); *see also* Nuttall, *supra* note 6, at 395 ("Of the declarations of principles proposed by COPUOS and adopted by the United Nations, the Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting [Principles on TV Broadcasting] provides the most focused look at the potential influence the United Nations expected satellite broadcasts to exert across international boundaries.")

[15] *See* G.A. Res. 2916, *supra* note 14. Section J of the Resolution concerns "Consultations and agreements between States." Paragraph 13 reads: "A State which intends to establish or authorize the establishment of an international direct television broadcasting satellite service shall without delay notify the proposed receiving State or States of such intention and shall promptly enter into consultation with any of those States which so requests." Paragraph 14 reads: "An international direct television broadcasting satellite service shall only be established after the conditions set forth in paragraph 13 above have been met and on the basis of agreement and/or agreements in conformity with the relevant instruments of International Telecommunication Union and in accordance with these principles."

[16] *Id.* at ¶ 8.

[17] *See* Comm. on the Peaceful Uses of Outer Space, Legal Subcomm., Rep. on its 17th Sess., Annex 2, at 6, U.N. Doc. A/AC.105/218 (1978) (containing draft principles on direct television broadcasting). There was also an effort to encourage consultation: "For that purpose a State which proposes to establish or authorize the establishment of a direct television broadcasting service by means of artificial earth satellites specifically directed at a foreign State shall without delay notify that State of such intention and shall promptly enter into consultations with that State if the latter so requests." *Id.*

[18] *See* International Covenant on Civil and Political Rights, art. 19(2), Dec. 16, 1966, 999 U.N.T.S. 171 ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.").

historical antecedents.[19] As one way to look at emerging patterns, one could say that in the absence of an agreed international approach, there are states that have adapted some versions of these principles, coming as close to a prior-consent principle or to the standards-related alternative as they technologically and politically can.

III. "INFORMAL" GOVERNANCE AND INFLUENCE

By and large, prior to the end of the 1990s and 9/11, the lack of an overarching international system to govern the distribution of satellite programming was of little significance.[20] Global players had not, as part of their communications strategy, fixed on transnational satellite programming, although some such efforts were nascent. Evangelical religious groups had begun to show the effectiveness of transnational broadcasting to affect allegiances.[21] Diasporic movements began to find the technology hospitable, followed by states seeking to link more closely with their nonresident populations. One such case involving the Kurdish community – and MED-TV, discussed later in the chapter – raised the major issues of how a set of focused satellite signals could reinforce a national identity among a geographically dispersed group, and what dangers that might pose to territorial integrity. Problems of regulation remained in the background because authoritarian countries could ban satellite dishes or otherwise control the receipt of information. To the extent that there were transnational broadcasting issues of political moment, they involved the residual short-wave radio efforts of the Cold War. These diminished in significance during the 1990s, with a few idiosyncratic and intense exceptions such as Radio Marti and Radio Free Asia.

Then, with the founding and broadcasting of Al Jazeera in 1996[22] and the NATO bombing campaign of 1999 (and with it a focus on the effort of Serbia to reach Serbians worldwide), the regional and global political impact of satellite transmissions began to attract renewed attention. As a result, internationally, states over the last

[19] *See* Nuttall, *supra* note 6, at 404 (noting that "advocates of economic growth that support the expansion of the satellite market to promote competition" view regulation as necessary "to transform the telecommunications markets from monopolies into freely competing markets").

[20] *See* John Tusa, "International Satellite Television – Good Neighbor or Global Intruder?," 7 *Eur. Bus. J.* 45 (1995) (discussing insufficiently developed satellite networks, in which numerous major players today "were scarcely in operation, their impact on societies and world events not yet fully felt or clearly demonstrated").

[21] *See* Michael Serazio, "Media Power, Politics and Proselytizing: The Global Gospel of American Christian Broadcasting," *J. Media and Religion* (2006), *available at* http://www.global.asc.upenn.edu/docs/GlobalGospel.pdf (discussing the soft-power implications of American Christian broadcasting as it competes in the international marketplace for loyalties); *see also* Michael Serazio, "Geopolitical Proselytizing in the Marketplace for Loyalties: Rethinking the Global Gospel of American Christian Broadcasting," Paper presented at the annual meeting of the NCA 94th Annual Convention, San Diego, CA (Nov. 21, 2008).

[22] Marc Lynch, *Voices of the New Arab Public: Iraq, Al-Jazeera, and Middle East Politics Today* (Columbia University Press 2006).

decade have begun groping again for some accommodation with the issues and positions put forward in the UN debate of the 1970s. There is not (and most likely never will be) an international agreement that involves the prior consent approach or a set of enforceable international standards. But unilaterally, bilaterally, and multilaterally, states will seek similar considerations, where they consider it important And, frequently, the efforts to do so will be informal, nonobvious, almost impermeable Decisions will be pragmatic (with some recognition of standards and obligations of speech-related human rights). Inferring from past experience, the justification for these formal and informal efforts include maintaining a balance of loyalties in the receiving country, protecting the business status quo of video providers; decreasing "terrorist" related programming; and maintaining standards of morality. The efforts deal with modes of production, transmission, and reception.

This section uses particular cases to demonstrate how these actions reflect the communications goals of the sender, and how restrictions reflect the counterstrategy of the receiving states

A. *MED-TV*

The case of MED-TV was one of the first in which the multilateral and informal aspects of satellite regulation significantly surfaced and the complexity of arrangements came to the fore. In 1994, MED-TV, a satellite service targeting Kurdish populations worldwide, was granted a ten-year license by the United Kingdom's Independent Television Commission (the "ITC").[23] MED-TV especially sought to reach Kurdish minorities in Turkey, Iran, and Iraq The United Kingdom was its locus of licensing because it was "established"[24] there, but its programming was produced in large part in Belgium. To some, the satellite feed was a culturally enriching mix of news, entertainment, and education aimed at a historically diasporic community of 35 million people engaged in rediscovering and redefining Kurdish nationhood and reaffirming its language and culture Naomi Sakr captured this view, calling MED-TV a "kind of Kurdistan in space,"[25] as it provided a culturally unifying function despite the lack of a Kurdish homeland or single territorial base. In sharp contrast, Turkish officials claimed that MED TV was the media arm of the PKK, the separatist Kurdish force that has been engaged in armed conflict with Turkish government troops and is considered by Turkey to be a significant threat to

[23] Which, before being merged into a new entity, OFCOM, regulated commercial TV broadcasts in the United Kingdom (whether terrestrial or satellite) Indeed, the United Kingdom became home to a variety of satellite services seeking to reach groups or populations abroad and operate with the legitimization of a British license

[24] The organization "established" itself in the United Kingdom, a technical term that meant that they were qualified to receive a license from the UK's Independent Television Commission

[25] Naomi Sakr, *Satellite Realms: Transnational Television, Globalization and the Middle East* 62 (I B. Taurus 2001).

the integrity and unity of the country.[26] For Turkey, MED-TV was a foreign intrusion, disturbing the local forms of regulation, and seeking to foment instability and violence. The Turkish government contended that MED-TV was fostering extremist claims and stirring up animosity among the Turkish population.

The Turkish government sought to suppress the receipt of the channels, for example, by attempting to ban the purchase and mounting of satellite dishes that could obtain the signals.[27] When this effort failed, Turkey sought to deny MED-TV leasing rights on government controlled transponders on Eutelsat and mounted a campaign to pressure the British government to withdraw MED-TV's license.[28]

The location and ownership of the transponders on the Eutelsat system that were used by MED-TV were politically significant. Under Eutelsat's internal rules, the satellite's transponders were (loosely) controlled by public agencies; the states that controlled those agencies had good bilateral relations with Turkey. Stories were told of MED-TV securing time on a Slovakian-controlled slot on a satellite only to have the Turkish Foreign Minister obtain a cancelation through bilateral discussions. MED-TV was unceremoniously bounced from various transponders on Eutelsat and its contracts for access canceled or left to expire. One of the features of such informal negotiations and decisions was the absence of any requirement that the reasons behind the decision be published or justified.

One solace, an anchor, as it were, was MED-TV's British license Whatever the station's political goals, the choice of a relatively secure legal and political system that would govern the delivery of its information seemed to be one of MED-TV's most important achievements and was a vital part of the strategy for obtaining transponder space to reach the relevant audience. Its establishment in the United Kingdom resulted in MED-TV's being subject to the ITC's content standards Receiving a British permit allowed MED TV to claim that it met those standards. This was seen as a means for increasing the chances that its programming would be subject only to legal, as opposed to extralegal, constraints.[29] Thus, Turkish officials

[26] *See* "Turkey Calls on USA to End MED-TV Broadcasts," *BBC Summary of World Broadcasts*, Aug 30, 1996; "MED TV Off the Air After UK, Belgian Police Raids," *BBC Summary of World Broadcasts*, Sep. 27, 1996, "Turkish Premier Discusses MED-TV With Tony Blair," *BBC Summary of World Broadcasts*, Dec. 19, 1997, Amir Hassanpour, "Med-TV, Britain, and the Turkish State: A Stateless Nation's Quest for Sovereignty in the Sky" (unpublished paper presented at the Freie Universitat Berlin, Nov. 7, 1995)

[27] For example, its transmission was originally on a satellite that directed its signal from a different location from the more commonly viewed Eutelsat satellites MED TV viewers had to turn their satellite dishes in a different direction from those receiving the Eutelsat original satellite, one that carried traditional Turkish entertainment channel services. The authorities could see the difference in the attitude of the dish and could use that information to harass the MED-TV viewers To protect its viewers, MED-TV had to shift, therefore, to the more commonly viewed bird in the sky

[28] Peter Feuilherade, "Med-TV- 'Kurdistan in the Sky'," BBC *News* (Mar. 23, 1999), *available at* http://news bbc.co.uk/2/hi/world/monitoring/280616.stm

[29] *See* Price, *supra* note 1 ("At the danger of pushing the metaphor too far, the MED-TV decision to obtain a license in the United Kingdom could be perceived as a rough equivalent of flying the British flag on the main mast").

mounted an extensive campaign to pressure the British government to withdraw MED-TV's license and close down the producer. As part of this campaign, the Turkish government contended, with some informal proffer of evidence, that MED-TV was a "political organization" linked to the PKK and therefore, under UK legislation, precluded from obtaining a British license

In February 1998, the ITC, charged with supervision of licensed entities in Britain, penalized MED-TV for three broadcasts, for a total fine of approximately $150,000.[30] According to the Commission, despite formal warnings, MED-TV violated the impartiality requirements of ITC's programming code. In one breach, according to the ITC, a "40 minute long programme consisted entirely of a political rally organized by the PKK." The violation was that "[n]o context was supplied and there was no balancing material." In a second breach of impartiality requirements, MED-TV "seemingly endorsed" the on-camera condemnation of a U.S. list of terrorist organizations that included the PKK. A third transgression involved "'personal comments' from a MED-TV journalist in the field, namely a description of the more pro-government Kurdish Democratic Party as 'treacherous and murderous.'" Finally, in 1999, the ITC withdrew MED-TV's license, finding that the station had too often violated standards of objectivity and impartiality At the time, Sir Robin Biggam, the ITC's chair, defended the decision, using an argument that was not within the terms of the decision itself: "Whatever sympathy there may be in the United Kingdom for the Kurdish people, it is not in the public interest to have any broadcaster use the UK as a platform for broadcasts which incite people to violence."[31]

Soon thereafter, MED-TV closed down.[32] The project, however, was only temporarily blocked; given the complex, robust, and many-sourced bazaar for transponder rentals, versions have cropped up, albeit always and continuously subject to pressures on national hosts, in France and elsewhere, to curtail the service.[33] Despite

[30] This history is recounted in Monroe E. Price, "What Price Fairness?" 12 *Media Studs. J* 82 (1998), from which this paragraph draws.

[31] *See* "UK Regulator Revokes Kurdish Med TV's License," *BBC News* (Apr 23, 299), *available at* http://news.bbc.co.uk/2/hi/world/monitoring/326883 stm("Whatever sympathy there may be in the United Kingdom for the Kurdish people, it is not in the public interest to have any broadcaster use the UK as a platform for broadcasts which incite people to violence. Med TV have been given many opportunities to be a peaceful voice for their community, to allow them to continue broadcasting after such serious breaches would be to condone the misuse of the UK's system for licensing broadcasters") (quoting ITC chair Sir Robin Biggam)

[32] David Romano, *The Kurdish Nationalist Movement: Opportunity, Mobilization, and Identity* 157 (Cambridge University Press 2006)

[33] *See* "New Kurdish TV Station Medya TV," *BBC Monitoring* (July 30, 1999 to Aug. 3, 1999). A successor, Medya-TV, opened in the summer of 1999, but under different legal circumstances.

> A new Paris-based Kurdish satellite television station identifying itself as Medya TV has been observed since 30th Jul It broadcasts via the Eutelsat Hot Bird 4 satellite at 13 degrees east (10853 MHz vertical polarization, audio subcarrier 6.65 MHz). This transponder also carries Kurdish and Christian programming from the UK-based CTV (Cultural TV). . . . News bulletins formerly carried on CTV appear to have transferred to Medya TV along with some of the presenters Medya TV carried a live relay of its official launch ceremony in Paris The ceremony was held in a hall with the Medya logo depicted in laser lights as the stage backdrop. Two large screens on either side of the stage showed the musicians and the announcers, who spoke in Kurdish What appeared to be a message marking the launching of the station by Kurdish National Congress President Serif Canli was carried at 1710 GMT. It was followed by a similar message in Kurdish from Yasar Kaya, president of the Kurdish parliament-in-exile

Id. Medya TV's license was revoked by the French authorities on February 13, 2004. "Kurdish Medya TV Shuts Down," Clandestine Radio Watch (Feb. 13, 2004), *available at* http://www.clandestineradio com/crw/news php?id 211&stn=684&news- 318

[34] *See* Movement of Islamic Reform in Arabia (MIRA), *available at* http //www islah info/index.php?/english/emppii/.

[35] *See* David Crawford, "A Battle for Ears and Minds: As Technology Gives New Voice to Dissent, a Saudi Vies to Be Heard," *Wall St. J*, Feb. 4, 2004 (discussing Islah's claimed purposes and innovative techniques) The BBC reported:

> Radio stations run by opposition groups are a rare occurrence in the Arab world, and the launch marks a dramatic breakthrough in a region where public broadcasting is tightly regulated by governments The new satellite station Sawt Al Islah – which means Voice of Reform – is using the latest internet technology to help disgruntled Saudis voice their criticism of the royal family A spokesman for the Movement for Islamic Reform In Arabia told the BBC that by using an internet phone service – known as Paltalk – listeners can take part in the programme and say what they like without risking arrest or harassment Saad al-Fagih said the bulk of the station's schedule was talk shows. The topics discussed, he said, included lack of transparency in the Saudi system, corruption, poverty and failure to implement Islamic law

Magdi Abdelhadi, "Saudi opposition gets radio voice," BBC News – World Edition (Dec. 9, 2002), *available at* http //news.bbc.co uk/2/hi/middle_east/2560313 stm

[36] Crawford, *supra* note 35.

the legal efforts, MED TV and its successors have persisted in finding ways to deliver some content to its dispersed audiences.

B. *Islah*

The case of MED-TV is atypical because of the formality of the proceedings involving its content. Far more typical was the informal regulation of content in the instance of Islah or Reform Radio.[34] The Islah case involved Abdulzazis Alkhamis, former head of the London-based Saudi Center for Human Rights. As part of a strategy of dissenting civil society, Alkhamis sought to open up a space for speech in Saudi Arabia that arguably promoted greater public participation and democracy (although there could be other characterizations of the content).[35] In 2002, he contacted Saad Al Fagih, head of the Movement for Islamic Reform in Arabia, as a potential partner for a radio channel they named "Islah," or "Reform," Radio.[36] (To illustrate the tenuousness of characterizations, Al Fagih was first referred to in the *Wall Street Journal* as a "dissident," but later described by the U.S. government with the harsh and conclusory label "terrorist" or "aider and abettor" of terrorists.) With a plan to use media to reach into Saudi Arabia with a "democracy"-related message, the next question was a technical one: How to have a signal reach Saudi Arabia and become available to Saudis so that Alkhamis and Al Fagih's message could be heard. They searched out individuals who were experienced in helping outside groups,

including church groups, state-sponsored international broadcasters, and splinter political groups, gain access across borders They hired Ludo Maes, a Belgian short-wave specialist, who helped Islah gain access to short-wave transmitters located in Lithuania that were left over from short-wave broadcasts during the Cold War.[37] With Maes' counsel, Islah also contracted to be broadcast over the Hotbird satellite, owned by Eutelsat. Deutsche Telekom was the lessee of bandwidth on the satellite and provided Islah uplink facilities. Reform Radio began broadcasting over satellite and short-wave in December 2002, encouraging listeners "to speak out against corruption and for a moderate Islamic government in Saudi Arabia."[38]

Intervention and difficulty began almost immediately. First, the short-wave signal was jammed by a powerful opposing transmitter (set up to transmit on the same frequency).[39] In addition, Maes received a formal communication from a lawyer representing the Saudi Embassy in Belgium threatening legal action to halt the broadcasts, accusing the project of inciting terrorism through the broadcasting of propaganda. With short-wave jammed, Islah relied on its satellite broadcasts (with the shortcoming that the radio broadcasts only could be received on Saudi television sets). For this and other reasons, Reform Radio established a satellite television station and set up an uplink in Croatia.[40] David Crawford continues the story:

> A week later, the phone rang at the Usingen Earth Station near Frankfurt, where T Systems, a Deutsche Telekom subsidiary, controls and monitors television, radio and data beamed to satellites. On the line was an anonymous caller. "Stop broadcasting Reform Radio or we will jam you," he said, according to someone involved in the incident About the same time, a powerful jamming beam turned the video monitor in the office to static.
>
> The jamming affected five TV programs broadcast via the same transponder, including several small commercial channels. When Deutsche Telekom stopped broadcasting Reform briefly, the jamming was stopped. A new anonymous phone call would then warn Deutsche Telekom not to resume broadcasting. On Oct. 25, Deutsche Telekom canceled its contract with Reform Radio.[41]

[37] See National Association of Shortwave Broadcasters, Inc., http://www.shortwave.org/ (demonstrating some of the variety of users, though emphasizing religious broadcasters); Clandestine Radio Stations broadcasting to Kurdistan, http://www.schoechi.de/cl-kur html (describing 2005 efforts by Maes relating to Kurdistan TDP Shortwave Transmitter Airtime QSL-Cards), http://www.airtime.be/qsl htm. (Maes' Transmitter Documentation Project); "hard-core-dx info" (Oct 21, 2001), http://www.hard-core-dx.com/archives/oct2001.html ("'My hunch, and it is only that, about the reason for TDP secrecy on actual transmitter sites, is that some of this business is under-the-table, i e technicians at certain under-used sites are paid to put the programs on the air without full knowledge or authorization by the governmental agencies owning them,' writes Glenn Hauser in an issue of DX Listeners Digest Ludo Maes has responded with dismay to these 'lies and serious accusations', adding 'Don't we have a right for not publishing transmitter sites?'"); TDP Clandestine and Opposition Shortwave Radio Stations and International Broadcasters, http://www.shortwave be/cla.html (listing opposition stations using short wave).

[38] Crawford, *supra* note 35.

[39] The ability to jam short-wave signals is far greater than the ability to jam satellite signals

[40] See Crawford, *supra* note 35 ("Mr. Fagih, liberal by Saudi standards but still orthodox on most religious issues, prohibited music for moral reasons. Mr. Alkhamis had no budget for video programming Instead, he broadcast a picture of the Reform logo, along with text information scrolling across the screen. The audio was from the radio broadcast ").

[41] *Id.*

But this was hardly the end of the station's difficulties. In December 2004, the United States added Al Fagih to the State Department's list of terrorists; shortly thereafter, Al-Fagih was put on the UN's Consolidated List of terrorists. The Movement for Islamic Reform in Arabia was added to the State Department's list in July 2005.[42]

For present purposes, the importance of this story is the variety of informal arrangements implicated in the contested effort by these interests to enter the Saudi "market for loyalties." To fathom what occurred, it is important to understand the structure of access to short-wave and satellite transponders, the technical aspects of jamming; the modes of informal threats to intermediaries, the techniques of states bringing pressure to bear on other states to alter modes of diffusion, the modes of affecting financing (through terror lists and other means), and the interrelationship of technologies There are elements that are difficult to retrieve, including how foreign dissenting channels are actually received, how reception fits in with constraints and policing that occurs in Saudi Arabia, and Our current understanding, for example, what modes of formal and informal surveillance serve as barriers to reception.

C. *Al Zawraa*

The case of Al Zawraa provides additional insights into the questions of informal pressure, this time involving a state that is neither the receiver nor the sender of the signal, namely the United States. Al Zawraa started as a broadcast channel in Iraq, with an audience pleasing entertainment format. Owned by Mishan Al Jaburi, leader of the Sunni Arab Front for Reconciliation and Liberation, the channel over time became more politicized, reflecting the owner's decision to run for the Iraqi parliament. More importantly, it morphed into what Ibrahim Al Marashi and others have called insurrectionist television,[43] playing, among other things, repeated videos of jihadist bombings with footage of attacks against multinational forces. In November 2006, the Iraqi government ordered the station to be terminated and its offices in Iraq closed on charges of "inciting violence and murder."[44]

[42] "U S. Treasury Designates Two Individuals with Ties to al Qaida, UBL Former BIF Leader and al-Qaida Associate Named Under E.O. 13224" (Dec 21, 2004) (press release), *available at* http://www treasury.gov/press-center/press-releases/Pages/js2164 aspx.

[43] Ibrahim Al Marashi, "The Dynamics of Iraq's Media: Ethno-Sectarian Violence, Political Islam, Public Advocacy, and Globalization," 25 *Cardozo Arts & Ent. L.J* 95 (2007).

[44] Andy Sennitt, "Iraq: US Blacklists Al Zawraa TV," *BBC Monitoring* (Jan 10, 2008), *available at* http://blogs.rnw.nl/medianetwork/iraq-us-blacklists-al zawraa-tv.

Banned from using transmitters in Iraq, Al Jaburi staked his future on a satellite strategy, leasing channels on Egyptian-owned Nilesat. The channel's campaign against the U.S.-supported Iraqi government intensified – broadcasting "a blend of pro-insurgent propaganda, video clips of attacks on Coalition forces and calls for violence against Iraqi Shi'is and the Iraqi government"[45] and "audio messages from the Islamic Army of Iraq, an insurgent group dominated by the Iraqi Ba'th Party loyal to former president Saddam Husayn."[46] An influential American blogger described showing the Al Zawraa feed to U.S. soldiers and Iraqis:

> The soldiers and terps [(interpreters)] described the meaning of the images, music and voiceovers. There were songs about the Iraqi "victims" of the "U.S. occupiers." The violence in Iraq is squarely placed on the shoulders of the Americans. The images include destroyed mosques, dead women and children, women weeping of the death of their family, bloodstained floors, the destruction of U.S. humvees and armored vehicles, and insurgents firing mortars, RPGs, rockets and AK-47s. Juba, the mythical Iraqi sniper, was featured prominently (the Iraqi soldiers believe he is a composite of multiple snipers.) The "mujahideen" are portrayed as "freedom fighters," and are seen going through "boot camp training." Attacks from across the country were shown, including in Abu Ghraib, Ramadi, Fallujah, Baiji, Baghdad and elsewhere. The soldiers are seasoned veterans from the 1st Iraqi Army Division, and have served throughout Iraq. Most of the footage was popular, rehashed videos widely distributed on the Internet and in jihadi forums. I recognized many of the videos. The soldiers were angry at the images before them. "They destroyed my country," said Staff Sergeant Riad."[47]

The U.S. government began discussions with the Egyptian government to terminate the Al Zawraa transponder lease on Nilesat. Closing Al-Zawraa became a preferred alternative for Iraqi and U.S. officials. A report on Cairo's *Al-Misriyun* newspaper Web site in early 2007 said the U.S. ambassador in Cairo had asked Egyptian Information Minister Anas al-Fiqi to

> pull the plug on the channel, on the pretext that it constituted the last weapon in the hands of those he described as the Sunni "rebels" in Iraq. The minister, however, declined to respond to the ambassador's request initially, affirming that the broadcasting of the channel was purely a business transaction that had nothing to do with politics. The operational costs of the Egyptian satellite required the

45 Peter Feuilherade, "Egypt Row Brews Over Iraqi Sunni Channel Al-Zawraa on Nilesat," *BBC Monitoring*, Jan. 9, 2007

46 *Id*

47 Bill Roggio, "Al-Zawraa: Muj TV," *The Long War Journal* (Dec. 10, 2006), http://www.longwarjournal.org/archives/2006/12/muj_tv.php. For Al Jaburi's response to Roggio's article, see Bill Roggio, "Al-Zawraa Responds to Muj TV," *The Long War Journal* (Dec. 25, 2006), http://www.longwarjournal.org/archives/2006/12/alzawraa_responds_to.php (demonstrating Aljabouri's efforts to distinguish al Zawraa from al Qaeda)

> renting of unoccupied channels. But threats made by supporters of the Shi'i Al-Mahdi Army affiliated with Muqtada al-Sadr to attack and kill members of the Egyptian diplomatic mission in Baghdad constituted pressure that drove Egypt to backtrack on its stand in this regard.[48]

There were dissenting voices (albeit not predominantly on free speech grounds):

> This is [a] major dilemma in the modern age of information warfare. On [the] one hand, programs like al-Zawraa provide ready and effective propaganda and recruiting material for the insurgency and al Qaeda, while demoralizing both Western and Middle Eastern allies. On the other, the intelligence gleaned from these operations is deemed too valuable to turn off the tap.[49]

Superficially, Nilesat officials resisted the pressure and indicated that carriage was merely a contractual matter. The Nilesat chair was reported as saying, in *Al-Misri Al-Yawm*, that "satellites do not monitor the channels they are carrying. Accordingly, the Egyptian satellite should not be part of the dispute regarding the channel. It is the right of whoever is hurt by the material broadcast by Al-Zawraa to respond through their channels or media."[50]

With the threat of being ejected from Nilesat, Al Jaburi claimed the station soon would be carried "on three satellites from European countries."[51] He refrained from identifying the satellites "because we are really afraid of American pressures. But after we transmit [from Europe] there will be no fear anymore because we will be on the air."[52] By late January, Al-Zawraa was observed to be broadcasting via the Saudi-owned Arabsat and France-based Eutelsat.[53] In February, the Nilesat transmission was closed after Nilesat accused the station of "interference" with other channels;[54] in April, the French regulator required Eutelsat to stop transmission, claiming that the station's broadcasting of propaganda was in breach of the September 30, 1986 law prohibiting stations from incitement to hate and violence for reasons of religion or nationality, and the 1881 law of freedom of the press.[55]

48 Feuilherade, *supra* note 45

49 Roggio, *supra* note 47.

50 Feuilherade, *supra* note 45

51 Lawrence Pintak, "War of Ideas: Insurgent Channel Coming to a Satellite Near You," USC Center on Public Diplomacy (Jan. 10, 2007), http://uscpublicdiplomacy.com/index.php/newsroom/pdblog_detail/070110_war_of_ideas_insurgent_channel_coming_to_a_satellite_near_you/

52 *Id.*

53 *See* "Iraqi Sunni Al-Zawraa TV now carried on Saudi-based Arabsat," *BBC Monitoring* (Jan. 26, 2007), "Iraqi Sunni Al-Zawraa TV now broadcasting on European satellite," *BBC Monitoring* (Jan. 31, 2007)

54 "Egypt Takes Militant Iraqi Channel Off Air," *Daily Star* (Feb. 26, 2007), http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=79858

55 Décision n 2007–293 du 3 avril 2007 mettant en demeure la société Eutelsat SA, [Decision No. 2007-293 of Apr. 3, 2007 giving notice to the company Eutelsat SA] *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000822549&dateTexte=

Finally, on January 9, 2008, Al Jaburi and Al Zawraa were placed on the U.S. sanctions list, precluded from any financial transactions with U.S. citizens or companies. According to *Intelligence Online*:

> On Jan. 9, the U.S. Treasury published a list of several individuals and entities subject to financial sanctions for backing Iraqi insurgents. Among them was the Iraqi politician Misham Al Jabouri and the satellite television channel he runs out of Damascus, Al Zawraa. Since October, 2006, the station continually ran messages and video clips shot by Sunni Baa'thist militia in their fight against American troops in Iraq. . . .
>
> Starting from last spring, only the Pan-Arab operator Arabsat, which is majority-owned by Saudi Arabia, continued to broadcast Al Zawraa via its *Badr3* and *Arabsat 2B* satellites. The State Department complained in vain to Riyadh before opting for a more aggressive strategy. In March, the frequency on which Al Zawraa broadcasted on Badr 3 (11747 MHz) was constantly jammed, forcing the station to cease its programs before switching to another frequency (11765 MHz).
>
> That manoeuvre won a reprieve for Al Zawraa for several months but the offensive resumed in July. Starting from July 7, reception of the station in Iraq became spotty and the channel remained unavailable for days at a time. On July 30, Al Zawraa finally ended broadcasting in Iraq. The channel sent several messages to its audience to say its signals were jammed. On July 24, the Sunni web forum Hanin.net announced that one of the channel's clandestine stations in Iraq had been bombed and that most of its employees were killed.[56]

The level of official frustration with Al Zawraa, with its inability to locate the production facilities, and the complex efforts to deny the channel access to distribution facilities, had ended with this step. The Al Zawraa case could be seen as a harbinger of the Arab Satellite Broadcast Charter that I discuss in the conclusion.

D *Al Manar*

I contrast the preceding examples with the very complex story of Al Manar,[57] the Hezbollah-related broadcasting station based in Lebanon, which was expanded to include a satellite distribution channel targeted at Arabic-speaking populations throughout Europe and beyond.[58] In this case, a much more formal process of

[56] "U.S. Pulls Plug on Insurgent TV, Baghdad," *Intelligence Online* (Jan. 17, 2008).

[57] *Al Manar TV*, http://www.almanar.com.lb/NewsSite/News.aspx?language=en.

[58] A statement from the European Union noted:

> In 1991, shortly after Hezbollah actively entered the Lebanese political scene, Al Manar was launched as a small terrestrial station. Although legally registered as the Lebanese Media Group Company in 1997, Al Manar has belonged to Hezbollah culturally and politically since its inception. Today, the terrestrial station can reach Lebanon in its entirety and broadcasts programming eighteen hours daily.
>
> Moreover, Al Manar's satellite station, launched in 2000, transmits twenty-four hours a day, reaching the entire Arab world and the rest of the globe through several major satellite providers. One of the satellite providers which has transmitted Al Manar has been the French satellite Hot

regulation began to emerge. The production and distribution of programming was a critical element in Hezbollah's constituency building within Lebanon and provided a link to interested audiences in Europe and elsewhere. To reach audiences in Europe, Al Manar deployed on Eutelsat, but almost immediately faced resistance, including from groups that objected to its statements concerning Jews and Israel.[59] In late 2003, Al Manar was accused, in France, of distributing anti-Semitic programming in violation of French standards.[60] The introduction of the satellite channel into Europe forced the French state into the role of umpire between conflicting interests.

Because Al Manar originated outside of France, and outside of the EU, it presented a jurisdictional and governance crisis. The question arose (and here, it is not necessary to take a position on the nature of the programming) whether the French regulatory agency, the Conseil Supérieur de l'Audiovisuel (CSA), had authority to take action. In February 2004, the CSA and Paris-based Eutelsat entered into an agreement regarding the oversight of satellite broadcasters from outside the EU not licensed by an EU member country.[61]

A Eutelsat press release stated that the organization shared the CSA's "indignation expressed on [the] broadcasting of racist programmes,"[62] but also made it clear that the carrier had no right to censure the programming it carried absent a regulatory requirement that it do so. The problem was a typical one involving satellite channels: There was no national license involved that would govern who had authority over the content of the channel. The CSA, on the other hand, took the position that because the channel was uplinked to Eutelsat, and Eutelsat was a French company,

"EU Rules and Principles on Hate Broadcasts: Frequently Asked Questions," *Europa*, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/98&format=HTML&aged=0&language=EN&guiLanguage=en.

[59] *See* "U.S. Following French Lead in Banning Hezbollah Station," *The America's Intelligence Wire*, Dec. 17, 2004. A week after the French ban, the United States designated Al Manar a terrorist organization, and transmission into the U.S. was banned. The interaction between the informal and the formal in terms of government action is complex but useful to examine. For example, Al-Nour Radio, deemed a Hezbollah-controlled radio station, was named a "specially designated global terrorist entity," a harsher categorization than the Terrorist Exclusion List, along with Al-Manar TV, by the U.S. Department of the Treasury in March 2006. The designation had its intended consequences. It caused the Spanish Hispasat, GlobeCast American, and New Skies Satellite companies to terminate Al-Nour's broadcasting to South America via Hispasat, Asia via AsiaSat, and New Skies Satellite to Europe.

[60] *See* U.S. Dep't of State, Report on Global Anti-Semitism (2005), *available at* http://www.state.gov/g/drl/rls/40258.htm. The report discusses Israel's complaints and states that in November 2004, "Al-Manar, the Lebanon-based television network controlled by Hizballah featuring blatantly anti-Semitic material, obtained a limited 1-year satellite broadcast license from the French authorities. This was revoked shortly thereafter due to Al-Manar's continued transmission of anti-Semitic material." France subsequently banned Al Manar.

[61] *See* "France-Eutelsat, Regulator Agree to Cooperate on Unlicensed Broadcasters," *BBC Summary of Worldwide Broadcasts*, Feb. 5, 2004.

[62] "Cooperation Between Eutelsat and the CSA" (Feb. 3, 2004) (press release), *available at* http://www.

the broadcasts (or at least the satellite carrier) were within the CSA's jurisdiction under the EU's Television Without Frontiers directive.

To clarify this authority in anticipation of some concern over power, the CSA already successfully had applied to the public prosecutor, arguing that "[t]he transmission by the Al-Manar channel of thirty episodes of 'Diaspora' may have been seen as anti-Semitic."[63] The CSA president highlighted the difficulties facing the agency when dealing with channels established outside the European Union which still fall under the competence of the French authorities. There were grave jurisdictional issues in engaging in action against satellite operators or their intermediaries through which these external channels were broadcast. The government had to deal with its own strategic concerns: its relationship to domestic communities, its historic relationship to Lebanon, and the convulsive nature of disputes within the Middle East as they found their way to Europe.

The CSA and Eutelsat began a policy of cooperation to check television channels transmitted by Eutelsat for their conformity to European legislation; the National Assembly adopted amendments allowing the CSA authority over operators of satellite networks, power to sanction Eutelsat, and authority to ask the Conseil d'Etat – France's supreme administrative court – to order a carrier to cease transmission of a service where a breach of human dignity, the safeguard of public order, or the protection of minors was involved.[64] Ultimately, by July 2004, the CSA requested the Conseil d'Etat to order Eutelsat to stop transmitting the station. According to the *Agence France-Presse* news agency, this followed the adoption of a new law on July 9 that gave the CSA new powers to ban satellite TV channels not subject to licensing.[65] Even here, the CSA actions were a combination of direct regulation, informal negotiation, and "voluntary" action by Al Manar itself. For example, in November of that same year, the CSA granted Al Manar the right to operate in France as long as it abided by French law and did not incite hate or violence. But just four days later, the station aired a show that prompted new criticism, and on December 13, 2004, the Conseil d'Etat ordered Eutelsat to stop transmitting Al Manar within two days.[66]

[63] *See* "France: Broadcast Regulator Explains Anti-Racist Policies," *BBC Monitoring World Media* (Mar. 3, 2004).

[64] *See* French Prime Minister's Office, "Prevailing Against Terrorism: White Paper on Domestic Security Against Terrorism," *available at* http://www.ambafrance-dk.org/IMG/pdf/livre_blanc_english.pdf (French Prime Minister's Office publication discussing its position regarding Al Manar and its subsequent effects to cooperate with European legislation to combat racism).

[65] *See* "Analysis: French Ban on Al-Manar TV Sparks Diplomatic Row," *BBC Monitoring Research*, Aug. 17, 2004.

[66] The text of the July 9 ruling is available at http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000439399. The text of the December 13 ruling is available at http://www.conseil-etat.fr/cde/node.php?articleid=1096. *See also* Elaine Sciolino, "A New French Headache: When Is Hate on TV Illegal?" *N.Y. Times* (Dec. 9, 2004).

IV. TOWARD THE FUTURE

Among the models for future treatment of these questions, the EU – in its post Al-Manar consciousness – presents a direction that is formal, regulatory, and bureaucratic. The consistent position on regulating satellite broadcasting within the EU has been that where a broadcast originates within the EU (which was not the case with Al Manar), it is the responsibility of the Member State, the so-called "country of origin," to regulate it. To this end, a series of practical criteria ("establishment" criteria in Article 2 of the Television Without Frontiers directive), for determining which Member State has jurisdiction. These criteria are:

- the location of the head office of the provider of services;
- the place where decisions on programming policy are usually taken;
- the place where the program to be broadcast to the public is finally mixed and processed; and
- the place where a significant proportion of the workforce required for the pursuit of the television broadcasting activity is located.[67]

An additional lens through which this debate can be seen involves a kind of conflict of laws analysis. For instance, in the EU, if a program is lawful in the Member State where it is established, then no other Member State can deny it entry. (There are specific exceptions to this rule, some of which – for example, looking more at the exclusive target audience of an offering – date from the 2007 amendments to the Television Without Frontiers Directive.[68]) It is the standard of the state of origin that determines whether a channel's programming passes muster.[69]

The Al Manar case was an intermediate step in terms of providing transparency in regulation and an effort to shape a systematic approach to satellite carried channels from outside the EU. Indeed, the reaction of the EU to the Al Manar case is the closest we have come to something that anticipates "global governance" or organized consideration of satellite-related delivery issues across many national boundaries. And it is not very close yet. If, as was the case with Al Manar, the satellite channel originates in a third country, outside the EU, different rules apply, according to the

[67] *See* Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, O.J. (L 332) 37, art. 2, ¶ 3 (amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities).

[68] *See* "Analysis: French Ban on Al-Manar TV Sparks Diplomatic Row," *supra* note 65, at 31 (graph 34).

[69] For more discussion on the country of origin approach, see Anna Herold, "Country of Origin Principle in the EU Market for Audiovisual Media Services: Consumer's Friend or Foe," 31 *J. Consumer Policy* 5 (2008). The debate over a new Audiovisual and Media Services Directive, which replaced the Television Without Frontiers Directive, partially concerned whether to shift, at least partially, from a country of origin to country of receipt approach.

French precedent. Member States must ensure that such a broadcaster comply with the EU rules if:

- it uses a frequency granted by that Member State,
- it uses a satellite capacity appertaining to that Member State, or
- it uses a satellite up-link situated in that Member State.[70]

Because most TV channels from outside the EU broadcast in Europe using satellite capacities provided either by Eutelsat, which is based in France, or by Astra, which is based in Luxembourg, France and Luxembourg have jurisdiction over a large number of third-country programs received within the EU. During the French proceeding involving Al Manar, the European Commission worked with the French authorities to achieve an EU approach that could be applied to all similar cases.[71] Where signals originating outside of the EU seek EU audiences (using satellites under the jurisdiction of individual Member States), the relevant authorities should block their diffusion (or at least alert the other Member States) if these incoming channels fail to meet EU standards.

In March 2005, after the Al Manar decision, EU officials recognized that difficulties would arise if it were only up to the particular states that had jurisdiction over satellite providers to police hate speech (or what might be generically called hate speech) issues. Better coordination among the states would be essential. The 2007 passage of the Audio Visual Media Services Directive, amending the Television Without Frontiers Directive, makes use of an uplink in a Member State a priority (after use of granted frequency).[72] This distributes jurisdiction over more Member States. What is not yet clear is how many, if any, of the problematic channel providers have shifted uplink sites to take advantage of a different country's jurisdiction, or the extent to which more states will assert authority.

Another problem is presented by third-country broadcasts that can be seen in Europe because of satellite spillover from other countries – that is, where the channel originates outside the EU and the facility used (satellite, frequency, etc.) also is outside the Member State zone. These spillover effects are one reason why the cooperation of regulatory authorities within the EU is insufficient and must be complemented by cooperation with regulators from third countries (for example, the Mediterranean Regulators' Group).

Another perspective – one with the appearance of formality but with great elements of the pragmatic – arises from local efforts to control satellite signals distribution in the

[70] *See* Directive 2007/65/EC, *supra* note 67, at 37, art. 2, ¶ 4.

[71] *See* "Conclusions, High-level Group of Regulatory Authorities in the Field of Broadcasting – Incitement to Hatred in Broadcasts Coming From Outside of the European Union," *Europa* Mar. 17, 2005, *available at* http://ec.europa.eu/avpolicy/docs/library/legal/conclusions_regulateurs/concl_reg_fin_en.pdf.

[72] *See also* European Union Committee, "Television Without Frontiers?: Report with Evidence," 3d sess. 2006–07, (Jan. 31, 2007), *available at* http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/27/27.pdf.

Middle East and to use hate speech and similar standards in the process. Most satellite channels viewed in the region are transmitted using transponders of two satellites, Nilesat and Arabsat, both of which are closely tied to regional governments. The management of the two satellites has varied in terms of the stringency of standards or the degree of control involved in determining what channels are transmitted. But as is true in most parts of the world, gaining or keeping a transponder for the distribution of information is primarily a business decision, not one tied to categorization of content.

In February 2008, the Ministers of Information of the Arab League met to develop a regional Satellite Broadcasting Charter (the "Charter") that would impact, even if not decisively, what signals would be carried over satellites controlled by members of the League.[73] They met at a time of great regional frustration occasioned by the extraordinary abundance of satellite signals that were reshaping flows of information in the region.[74] In societies where information, especially via radio and television signals, had been a highly controlled commodity – where an almost universal characteristic of governance was control over the channels of communication – the satellite revolution was providing an irksome new reality.[75] Porousness could lead to new political formations, could undermine stability, and certainly could disturb the state's long-standing control of narrative. Some countries, such as Iraq, barred antennae. With the arrival of Al Jazeera in 1996, there was a sea change, as the channel aggressively covered politics in many Middle Eastern capitals. It was an object of frustration to established autocracies because it seemed to touch an important nerve in the regional audience, which was desirous of receiving more thorough news about their leaders.[76] In addition, there was the persistent concern about western channels bringing western values (or lack of values) and interfering with traditional teachings and ways of life. The state control that had been central to the nature of the state now threatened to dissipate.[77]

[73] An English translation of the Arab Satellite Broadcasting Charter is available at "Arab Satellite Broadcasting Charter: Principles for Regulating Satellite Broadcasting Transmission in the Arab World," *Arab Media & Soc'y*, Feb. 2008, *available at* http://www.arabmediasociety.com/articles/downloads/20080314081327_AMS_Charter_English.pdf.

[74] *See* "Arab TV Broadcasters Face Curbs," BBC News, Feb. 12, 2008, *available at* http://news.bbc.co.uk/2/hi/middle_east/7241723.stm.

[75] *See* William A. Rugh, *Arab Mass Media: Newspapers, Radio, and Television in Arab Politics* (Praeger 2004); *see also* Sakr, *supra* note 25.

[76] *See* Marc Lynch, *Voices of the New Arab Public: Iraq, Al-Jazeera, and Middle East Politics Today* (Columbia University Press, 2006); *The Al Jazeera Phenomenon: Critical Perspectives on New Arab Media* (Mohamed Zayani ed., Paradigm Publishers 2005); Mohammed el-Nawawy and Adel Iskander, *Al-Jazeera: How the Free Arab News Network Scooped the World and Changed the Middle East* (Westview Press 2002); Hugh Miles, "Al Jazeera," 155 *Foreign Pol'y* 20 (July-Aug. 2006); Naomi Sakr, "Media Development and Democratisation in the Arab Middle East," 6 *Global Dialogue* 98 (Winter/Spring 2004).

[77] *See* Rugh, *supra* note 75. *See also* Brookings Doha Center, "Forward or Backward: The 2008 Arab Satellite TV Charter and the Future of Arab Media, Society, and Democracy," at 17 (Mar. 17,

Adopting the Charter was an attempt to control competition among satellite providers and to impose a set of restraints on what the satellite signals would provide. It was drafted to establish regional standards that would be enforced by the signatories, a mode of determining which law applied, and an internal system for complaint by one country to another with a method for ensuring some compliance with regional goals. The Charter provides guidelines as to what should be prohibited or what regulations should govern the behavior of satellite providers. These satellite providers (broadly conceived) should not, according to the Charter, "jeopardize social peace, national unity, public order and general propriety."[78] In addition, the satellite entities should adopt standards requiring them to abstain from inciting hatred or ethnic, color, racial, or religious discrimination, from broadcasting any material that would incite violence or terrorism (interestingly, differentiating between terrorism and "resisting occupation"). Furthermore, the Charter encourages programming that reinforces the religious and ethical values of the Arab society, and prohibits satellites from broadcasting anything that would insult God, revealed religions, prophets, *mazhabs* (religious schools), and religious symbols of each group (with the groups included not fully identified).

There are grace notes that have the flavor of modernization. The satellite broadcasters, according to the Charter, should provide "the largest number possible of programmes and services to maintain the Arab identity and the Islamic culture and values and to highlight the Arab contribution to human civilization." They should promote dialogue and understanding among different cultures. And there is a note of political regional integration to the Charter in the call for satellite agencies to "maintain Arab identity against the negative impact of globalization and reaffirm the specificity of the Arab world." To do this, however, there should be a policy of avoiding the broadcast of "anything that would contradict or jeopardize Arab solidarity." And, of course, the channels should not insult leaders or national and religious symbols.

Al Jazeera, whose frequent criticisms of many Arab governments made it one of the supposed targets of the Charter, organized a panel discussion the day the Charter was issued. In a video report, one commentator pointed out that regulation of Arab satellite channels was motivated by threats to the more mature, state-based channels from "a large number of profit-seeking channels that aim to attract viewers by nudity, charlatanry, and sectarianism."[79] Competition yielded a race to the bottom, he argued, where civility would be sacrificed and sensationalism and lack of objectivity would prevail.

2008), *available at* http://www.brookings.edu/~/media/Files/events/2008/0317_arab_media/0317_arab_media.pdf (comments by Saad Eddin Ibrahim).

78 "Arab Satellite Broadcasting Charter: Principles for Regulating Satellite Broadcasting Transmission in the Arab World," *supra* note 73.

79 "Al-Jazeera Pundits Discuss Proposed Arab Satellite TV Regulations," *BBC Monitoring World Media*, Feb. 20, 2008.

A second panelist, Abd-al-Bari Atwan, editor-in-chief of *Al-Quds Al-Arabi*, and independent Pan-Arab newspaper based in London, represented a different current of thinking. He argued that the Charter was drafted because "the repressive, dictatorial Arab governments have begun to realize that Arab public opinion is moving strongly," and so Arab information ministers have hastened to "bury this awakening in Arab public opinion" by enacting legislation to "gag and criminalize Arab media." The priority of the ministers of information, he suggested, was to protect the regimes that made those decisions. The objective of the Charter, he argued, was not necessarily to uphold Arab values and ethics, but "to preserve those repressive measures by governments that engage in torture and corruption, squander public funds, and violate human rights."[80]

The Charter gives additional political cover to governments that wish to impose more restrictions, and it seems to augur a new order of pervasive licensing and authorization – or at least to legitimate more extensive supervision.[81] The Charter's existence remains controversial. Some claim that the Charter is so cumbersome as to be ineffective.[82] Others argue that presents no threat because the standards are a "code of honor," a form of self-regulation rather than state enforcement.[83] Yet already there are accounts that the Charter has served to justify additional restrictions by Egypt in contracts for the use of Nilesat;[84] such restrictions might also be imposed on the use of production facilities in media cities in Egypt and elsewhere. Nevertheless, the Charter should be seen in a global context of regulation, alongside a fear of the incompatibility of satellite with domestic control of broadcast signals.

The existence of a pattern of regulation should not be used to justify suppression of dissent or other systematic modes of controlling speech. But comparative insights help in understanding what steps are being taken and in fashioning criteria for judging their appropriateness.[85]

80 *Id.*

81 "Some satellite television channels based in Egypt are concerned, amid assertions by the government on the need to enforce a document regulating the work of satellite television channels. The Arab information ministers endorsed this document at an emergency meeting in Cairo last month." "Five Private Egyptian Satellite TV Channels Face Prospect of Closure, Ban," *BBC Worldwide Monitoring*, Mar. 7, 2008 (quoting Khalid al-Shami's March 6, 2008 report in *Al-Quds al-Arabi*).

82 "Al-Jazeera Pundits," *supra* note 79.

83 *Id.*

84 *See, e.g.*, "Egypt's Nilesat Halts Transmission of London-Based Al-Hiwar TV," *BBC Monitoring World Media*, Apr. 3, 2008.

85 *See* "Communication from the Euromed and the Media Taskforce to the Euromed Culture Ministers" Athens (May 29–30, 2008), *available at* http://ec.europa.eu/external_relations/euromed/media/athens_final_communique_0507_en.pdf. For a while, it appeared there might be a "copycat" charter for the so-called Euromed states. Having seen the criticism of the Arab Charter, the Euromed group drafted a Declaration, not a "Charter," seeking to avoid suspicion that they were moving to a binding international legal instrument. Secondly, it would be neutral from a technological point of view, dealing with any kind of audiovisual content (not only that distributed by satellite). Its scope would be any signal received in the Mediterranean area and broadcasted under the jurisdiction of any Mediterranean authority. Personal Communication from Joan Barata Mir, Catalan Regulatory

V. CONCLUSIONS

This chapter describes a system in which formal law – even formal agreements among countries – may not be descriptive of governmental actions concerning hate-speech-related content on satellites. This chapter discusses the use of explicit transparent modes for regulation and cooperation, such as the coordination effort at the EU level. Further, this chapter describes how informal relationships among states or between states and programming entities are the more relevant determinant of behavior. What emerges is the need to identify or abstract from the preceding examples which points require additional understanding. For example, we see in some aspects of the MED-TV example that control over uplinking is a site for negotiation. We can see in the case of Eutelsat and Al Manar that the act of making available a transponder is a second opportunity for intervention. A more formal act, certainly, is placing a satellite service on a Terrorist Exclusion List and thus criminalizing not only the broadcasting entity but also those who deal with it. We can analyze the passage of a signal from the point of production to the point of reception to determine opportunities that have been used to urge or obtain restriction.

In all of this, the role of "law" – law as a set of properly established criteria to limit governmental intervention – is fugitive and hard to capture. A state's efforts to pressure carriers of satellite signals often will be disguised and hardly subject to any jurisdiction. The state's actions may be speech-repressive and anticompetitive, but still difficult to discern. In many cases, the state will be seeking to secure greater control of the words and images that circulate within its borders. At other times, it will be seeking to prevent the diffusion of disfavored views quite broadly. There are scarce mechanisms or standards to determine what the limits to this kind of conduct should be.

There is no system of global governance with respect to satellite signals, and it is doubtful that such a system will emerge.[86] The EU seeks a more transparent system

Commission ("It seeks to identify and to proclaim some common basic principles that we share both European and North-African and Middle East countries. It has been, at least, an interesting exercise of negotiation and a very hard effort in order to find a final version which could satisfy many different kind of authorities belonging to diverse legal and constitutional systems.").

[86] At an early stage – in the mid-1990s – the United States precluded signals from non-U.S. licensed satellites to send them to the United States, except under prescribed circumstances.

> Leveraging three years of goodwill and momentum amassed by the WTO negotiations, recent U.S. policy has focused on restructuring the ISOs. In May 1996, the FCC issued a notice of proposed rulemaking known as the Domestic International Satellite Consolidation Order ("DISCO I"), which established criteria to permit foreign-based operators to offer service in the United States.
>
> DISCO I proposed a test in which the granting of a license to a foreign operator to provide services in the United States would be contingent upon a showing that U.S.-based satellites have effective competition opportunities ("ECO-SAT test") in: (i) the home market where the foreign operator is licensed; and (ii) all "route markets" that the foreign satellite intends to service from earth stations in the United States. In light of the recent WTO agreement, however, DISCO I was reconsidered because the WTO agreement allows nondiscriminatory access to markets without consideration of where a foreign operator is licensed.

with respect to certain kinds of content within its borders; conversely, the Arab Charter suggests a somewhat more brutal version of the exercise. In the absence of regulation, informal efforts to persuade, pressure, and even threaten satellite providers are likely to continue. We are beginning to sense patterns emerging, but it is only as the technology itself is becoming slightly overshadowed. Terrorism is the trope that has succeeded in breaking the rules of flows of information where cultural exception, fear of pornography, sweeping concerns about cultural imperialism, and fears for national identity had failed. Terrorism has brought the deacons of free expression to the table of regulation, even of clumsy intervention. What remains to be seen is whether, in this increasingly important area of speech and its distribution, there is a major shift from informal decision making, either as part of leasing or decisions in the shadow of law, toward a model of more transparent jurisdiction, with more traditional regulatory decisions and the invocation of the rule of law.

Henry Wong, Comment, "2001: A Space Legislation Odyssey – A Proposed Model for Reforming the Intergovernmental Satellite Organizations," 48 *Am. U.L. Rev.* 547, 565–6 (1998).